TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1962

No. 229

FEDERICO MARIN GUTIERREZ, PETITIONER,

vs.

WATERMAN STEAMSHIP CORP.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

PETITION FOR CERTIORARI FILED JULY 5, 1962
CERTIORARI GRANTED OCTOBER 8, 1962

INDEX

UNITED STATES DISTRICT COURT

Adm. 19-59

FEDERICO MARIN GUTIERREZ,
Libelant
v.
STEAMSHIP "SS HASTINGS", her engines, boilers, etc. and
WATERMAN STEAMSHIP CORP.
Respondents

CIVIL DOCKET

1959		
Apr.	3	Transcript of record from U.S. District Court for the Southern District of New York, received and filed.
	27	Appearance of S. L. Feldstein and H. B. Nachman as proctors for libelant, filed.
Sept.	8	Deposition of Federico Marin Gutierrez for resp., filed.
	8	Notice of filing of deposition, filed.
	21	Trial is set for March 16, 1960 at 9:30 A.M.
Oct.	5	Notice of deft. for taking of deposition, filed.
Nov.	23	Interrogatories to libelant, filed.
Dec.	3	Objections of libellant to interrogatories, filed.
	11	Stip. for withdrawal by plff. of its objections to interrogatories 5 and 19 etc., filed. 12/11/59—Approved.
	11	A stip. having been filed no action is taken on libelant's objections to interrogatories.
	14	Stip. for withdrawal by libellant of objections to interrogatories 35, 36 and 37 etc., filed. 12/14/59—So ordered.
	15	Answers to interrogatories filed by libellant.

1960

Feb. 18 Notice of mot. of resp. for leave to file exceptive allegations and affidavit in support thereof, filed, with exh. attached.

26 Order entered granting leave to resp. to file exceptive allegations.

26 Memorandum of law in support of respondent's mot. for leave to file exceptive allegations, filed.

26 Exceptive allegations filed with exhibit 1 attached.

Mar. 7 Order entered continuing hearing on respondent's exceptive allegations until 3/11/60 and resetting trial for March 21, 1960 at 9:30 A.M.

9 Stip. waiving posting of bond, filed.

9 Answer of Waterman SS Corp., filed.

11 After hearing argument of counsel, respondent's exceptive allegations taken under submission. Mr. Nachman granted until Monday to submit memo, and Mr. Rout allowed 3 days thereafter to file reply.

11 Memo. of resp. in support of exceptive allegations, filed.

18 Memo. of law in opposition to respondents' exceptive allegations, filed.

21 Trial had and cont'd. to 3/22/60 at 10:00 A.M.

21 Exhibit 1 for libellant, filed. Exhibits 1, 2, 3, 4, 6, 8 for resp., filed.

22 Further trial resumed and cont'd. until 3/23/60 at 10:30 A.M.

23 Trial resumed—further testimony heard—respondents moved for dismissal—mot. denied. Ct. granted ea. party 15 days after they are furnished with copy of transcript of expert medical testimony to file briefs.

23 Exhibit 2 for libelant, filed.

23 Exhibits 9, 10, 11, 12, 15, 16, 17 for resp., filed.

1960

Apr. 28 Transcript of court reporter re: excerpt of testimony taken Mar. 21 and 22, 1960, filed.

May 11 Libelant's memo. after trial, filed.

13 Mot. of resps. for ext. of 15 days after date of receipt of transcript of testimony of Dr. J. Iguina, and or translations of certain exhibits etc., to file memo., filed. 5/16/60—So ordered.

16 Transcript of court reporter re: testimony of Dr. Iguina taken during trial on 3/22/60, filed.

June 10 Stipulation and order to withdraw certain exhibits filed. 1 s/copy issued to: Golenbock, Nachman and Feldstein; Hartzell, Fernandez & Novas, Esqs.

Oct. 18 Respondent's trial memo. filed.

20 Libellant's reply memo., filed.

Dec. 29 Memorandum opinion directing counsel for libellant to submit within 15 days proposed findings of fact, conclusions of law and form of decree, serving copy thereof to counsel for respondent, who shall thereafter have a like period to submit objections and amendments thereto, filed. 1 s/copy issued to each of the parties.

1961

Jan. 13 Libellant's proposed findings of fact, etc. tendered. (Approved as to form by resp.)

Feb. 13 Objections and amendments of resp. to proposed findings of facts, etc., filed.

Feb. 17 Mot. of libelant to adopt findings of fact and conclusions of law as proposed by libellant and to enter decree, filed.

May 4 Findings of fact, conclusions of law and decree in favor of libellant against respondent for $18,250.00 with interest, etc., filed. 5/4/61—Decree entered. 1 s/copy issued to each of the parties.

1961

22 Libellant's Bill of Costs, filed.

26 Costs taxed by Clerk in the amount of $142.79.

June 7 Notice of respondents of appeal, filed.

7 Bond for costs on appeal, filed.

22 Transcripts of court reporter re: trial, filed. (First, second and third ~~day~~)

July 12 Mot. of appeallant for 30 days ext. of time to file record on appeal, filed. 7/12/61—Granted.

Aug. 3 Mot. of resp. for order directing the State Insurance Fund to return their file No. 5V 7591 to this Court, filed.

4 Order granting mot. of resp. of Aug. 3, 1961, filed. 2 s/copies issued to Hartzell, Fernandez & Novas, 1 s/copy issued to Nachman & Feldstein.

10 Mot. of appellant for ext. of time up to Sept. 5, 1961 to file record on appeal, filed. 8/11/61—Granted.

31 Record on Appeal mailed to U.S. Court of Appeals in Boston.

LIBEL

To The Honorable Judges of Said Court:

The libel and complaint of Federico Marin Gutierrez, against the "SS Hastings", her engines, boilers, apparel, tackle, furniture, etc. and against Waterman Steamship Corp., owner, operator, agent and/or charterer of the "SS Hastings", in an action of tort, civil and maritime, alleges on information and belief as follows:

As And For A First Claim for Relief;

First: That at all the times hereinafter mentioned, the libelant, Federico Marin Gutierrez, was and now is a citizen of the Commonwealth of Puerto Rico, residing in the Commonwealth of Puerto Rico.

Second: The "SS HASTING" is now, or during the pendency of process herein, will be within the jurisdiction of this Honorable Court.

Third: That at all the times hereinafter mentioned, the respondent WATERMAN STEAMSHIP CORP., was and still is a corporation duly organized and existing under and by virtue of the laws of the State of Alabama, with an office for the transaction of business in the State of New York.

Fourth: Upon information and belief that at all the times hereinafter mentioned, the respondent WATERMAN STEAMSHIP CORP. owned, operated, managed, controlled, supplied, provisioned, manned and was in possession of the vessel, "SS HASTINGS".

Fifth: That on or about the 21st day of October, 1956, the said vessel, "SS HASTINGS" was in port at Ponce, Puerto Rico.

Sixth: That on or about said date, the respondents had contracted with an independent stevedore for the movement and handling of the cargo of said vessel.

Seventh: That on or about the 21st day of October, 1956, the libelant was an employee of said independent stevedore in the capacity of longshoreman and as such was working on the dock adjacent to the said vessel, "SS HASTINGS" and performing certain work in connection with the movement and handling of cargo of the said vessel.

Eighth: That on or about the 21st day of October, 1956, the libelant, while in performance of his duties as a longshoreman on the dock immediately adjacent to said vessel, working under and by authority of the master, owner, agent or charterer of said vessel and the respondents he was caused to sustain serious and severe personal injuries when he was precipitated to the ground on said dock by reason of the improper storage of cargo on said dock.

Ninth: That the said occurrence was caused without any contributing fault or neglect on the part of the libelant, but

solely by the defective, unsafe and improper storage of cargo on the dock immediately adjacent to said vessel, and by the fault and negligence of the master, officers and crew of the said vessel and by the fault and negligence of the respondents in the following, among other particulars, which will be pointed out on the trial of this motion: In that the said vessel, its master, owners, agents or charterers and the respondents, their agents, servants and/or employees failed to furnish the libelant with a safe place in which to work; failed to provide libelant with a safe and seaworthy vessel and to keep the same in a safe condition; failed to have aboard the vessel a safe, competent and adequate crew and officers; failed to warn the libelant of the dangers to arise and to be encountered in the performance of his work aboard the vessel; failed to warn the libelant of the dangerous, defective and unsafe condition of the vessel, her compartments, appliances and cargo; failed to promulgate and enforce proper and safe rules for the proper performance of the work aboard the vessel; failed in a general way to maintain and operate the said vessel in such a manner as to avoid the occurrence of the aforesaid accident, all of which the master, owner or charterer of said vessel and the respondents knew or should have known.

Tenth: By reason of the premises, the libelant sustained serious and severe injuries to his head, arms, legs, body and nervous system, some of which, upon information and belief, wil be permanent; that he was compelled to expend divers sums of money and incur liability to cure himself of said injuries and to alleviate the pain and suffering; upon information and belief, he will be compelled to make such further expenditures in the future; that the libelant has lost and will lose in the future sums of money which he otherwise would have earned.

Eleventh: That lashes do not apply in the instant case for the following reasons:

1. That the respondent WATERMAN STEAMSHIP CORP. has not registered with the Secretary of State of the Commonwealth of Puerto Rico and has not designated an agent for the service of process in the Commonwealth of Puerto Rico and is, therefore, not amenable to service of process.

2. That by virtue of the fact that the respondents are not amenable to service within the Commonwealth of Puerto Rico, the analogous statute has been tolled.

3. Libelant claims that there is no laches by virtue of the analogous statute of the forum which should be applied.

4. That the respondent has not been prejudiced because it has had due notice of the accident and of the claim made in the Fondo del Sagaro in Puerto Rico through its subsidiary corporation and upon information and belief, the respondent has in its possession an accident report and complete availability for making an investigation of the accident and the claim for relief.

5. That in any event, the respondent is at the present time as well able to defend this law suit as it was had the action been commenced at some earlier period of time and that, therefore, it is in no way prejudiced.

Twelfth: All and singular, the premises are true and within the admiraley and maritime jurisdiction of the United States and of this Honorable Court.

Thirteenth: And soley by reason of the aforesaid, libelant has been damaged in the sum of ONE HUNDRED THOUSAND (100,000.00) DOLLARS.

AS AND FOR A SECOND
CLAIM FOR RELIEF:

Fourteenth: Libelant reposes, reiterates and realleges each and every allegation contained in paragraphs "FIRST"

through "SEVENTH" of this Libel with the same force and effect as if set forth at length herein.

Fifteenth: That it was the duty of the respondents to provide the libelant with a seaworthy and safe vessel, appliances and crew and to keep same in a seaworthy condition.

Sixteenth: The aforesaid injuries sustained by the libelant were directly cause by the failure of the respondents, their agents, servants and/or employees to provide a seaworthy, safe vessel, appliances and crew and to keep same in a seaworthy condition.

Seventeenth: That by reason of the failure of the respondents, their agents, servants and/or employees to provide a seaworthy and safe vessel, appliances and crew, libelant has been damaged in the sum of ONE HUNDRED THOUSAND ($100,000.00) DOLLARS.

WHEREFORE, libelant prays:

1. That process *in rem* may issue in due form of law, according to the practice of this Honorable Court in causes of admiralty and maritime jurisdiction, against the said vessel, "SS HASTINGS", bar engines, boilers; apparel, tackle, furniture, etc., and that all persons having or claiming any interest therein may be cited to appear and answer all and singular the matters aforesaid:

2. That process *in personam* may issue in due form of law, according to the practice of this Honorable Court in cases of admiralty and maritime jurisdiction against the respondent WATERMAN STEAMSHIP CORP., owner, operator and/or charterer of the vessel, "SS HASTINGS", and that said company may be cited to appear and answer all and singular the matters aforesaid; and in the event that the respondents cannot be found in this District or within this jurisdiction, then all goods, chattels and effects belonging to it within this district or within this jurisdiction, and in particular the vessel, "SS HASTINGS" and her engines,

boilers, apparel, tackle, furniture, etc. be attached in the amount of ONE HUNDRED THOUSAND ($100,000.00) DOLLARS, the sum sued for in this libel, with interest, costs and disbursements of the libelant;

3. That this Honorable Court may be pleased to decree to the libelant his damages with interest and costs, and that the said vessel, "SS HASTINGS", her engines, boilers, apparel, tackle, furniture, etc., may be condemned and sold to pay the same, and that the libelant may recover his damages from said respondents; and

4. That the libelent may have such other and further relief as in law and justice he may be entitled to receive.

JEROME GOLENBACK
Proctor for Libelant
225 Broadway
New York, N.Y.

ANSWER

To the Honorable Clemente Ruiz Nazario
Judge of the aforesaid Court:

The answer of Waterman Steamship Corp. to the libel of Federico Marin Gutierrez, alleges on information and belief as follows:

AS TO THE FIRST CLAIM FOR RELIEF

1. It admits all the matters alleged in Article FIRST of the libel.

2. As to the matters alleged in Article SECOND of the libel, it denies that the "SS HASTINGS" is now within the jurisdiction of this Honorable Court. It denies knowledge and information sufficient to form a belief as to all the other matters alleged in Article SECOND of the libel.

3. It admits all the matters alleged in Article THIRD of the libel.

4. As to the matters alleged in Article Fourth of the libel, it admits that at the times mentioned therein, it owned the "SS Hastings", and that it operated, managed, controlled, supplied, provisioned, manned and was in possession of those portions of the "SS Hastings" which were not operated, managed, controlled, supplied, provisioned, manned and in possession of the independent stevedores referred to in Article Sixth of the libel, its agents, servants and employees. It denies all the other matters alleged in Article Fourth of the libel.

5. It admits all the matters alleged in Article Fifth of the libel.

6. It admits all the matters alleged in Article Sixth of the libel.

7. As to the matters alleged in Article Seventh of the libel it admits that on or about the 21st day of October, 1956 one Federico Marin Gutierrez was an employee of said independent stevedore in the capacity of longshoreman, and as such was working on the dock adjacent to said vessel, "SS Hastings", and performing certain work in connection with the movement and handling of cargo of ~~the~~ said vessel.

8. It denies all the matters alleged in Article Eighth of the libel.

9. It denies all the matters alleged in Article Ninth of the libel.

10. It denies all the matters alleged in Article Tenth of the libel.

11. It denies all the matters alleged in Article Eleventh of the libel.

12. It admits the admiralty and maritime jurisdiction of the United States and of this Honorable Court. It denies all the other matters alleged in Article Twelfth of the libel.

13. It denies all the matters alleged in Article Thirteenth of the libel.

As to the Second Claim for Relief

14. It repeats, reiterates and realleges each and every answer and denial contained in its answer to Articles First through Seventh of the libel with the same force and effect as if set forth at length herein.

15. It denies all the matters alleged in Article Fifteenth of the libel.

16. It denies all the matters alleged in Article Sixteenth of the libel.

17. It denies all the matters alleged in Article Seventeenth of the libel.

Affirmative Defenses

Further answering and as separate defenses respondent alleges as follows:

18. If the libelant sustained any injuries and or illnesses as alleged in the libel, said injuries and or illnesses were caused in whole or in part by libelant's own negligence without any fault or negligence on the part of the respondent, its officers and crew of the "SS Hastings", nor as a result of the unseaworthiness of the "SS Hastings", her engines, tackle, apparel and or appliances.

19. The occurrence alleged in the libel was the result of an unavoidable accident.

20. Libelant's alleged cause of action is barred by the provisions of Section 1868 of the Civil Code of Puerto Rico, 1930 Edition (31 LPRA 5298).

21. Libelant's alleged cause of action is barred by the provisions of Article 31 of Act No. 45, approved by the Legislature of Puerto Rico on April 18, 1935 as amended by Act No. 70 approved by the Legislature of Puerto Rico on June 15, 1955 (11 LPRA 32).

22. Libelant's alleged cause of action is barred by laches and respondent has been prejudiced by libelant's delay in filing his libel.

23. The libel fails to state a cause of action against respondent.

WHEREFORE, respondent prays that the libel herein be dismissed with costs.

HARTZELL, FERNANDEZ & NOVAS
By: (s) ANTONIO M. BIRD
Proctors for Respondent
Room 908 Banco Popular Bldg.
P. O. Box 392, San Juan, P. R.

MEMORANDUM

Upon the conclusion of the trial of this suit, the court stated from the bench that it was convinced, from the evidence adduced, that respondent's liability, both as regards unseaworthiness and negligence, had been proven and that libelant had overcome respondent's exceptive allegation in all its three grounds.

Accordingly the case was submitted exclusively for the purpose of determining the loss of earnings and other damages suffered by the libelant and recoverable from the respondent on account of the accident involved herein. It that respect, the court then directed that the expert medical testimony be transcribed and that once the transcript was delivered to the court and to counsel for the parties, the latter submit briefs in support of their respecting contentions as to earnings and damages.

The transcripts were in due course filed and libelant thereafter filed his memorandum on these two questions.

Respondent did not submit its memorandum until October 18, 1960.

Although the court had definitely directed counsel to limit their memoranda to the questions of loss of earnings and other damages, counsel for respondent saw fit to discuss and argue in its memorandum, not only the above issues

but also the issues of respondent's liability based on unseaworthiness and negligence, as well as the issue raised in respondent's exceptive allegations.

I have carefully considered the transcript of the expert medical testimony and counsel's memoranda and I am now fully advised in the premises.

-I-

As to the respondent's liability based on unseaworthiness and negligence respondent's memorandum of October 18, 1960 has failed to convince me that the ruling thereon given from the bench at the termination of the trial should in any way be disturbed or modified.

The fact that libellant suffered his injuries while working on the apron does not in any way preclude him from recovering on the basis of the unseaworthiness of the vessel.

See: *Marceau* v. *Great Lakes Transit Corporation*, (2 Cir.) 146 F.2d 416, 418.

Robillard v. *A. L. Burbank & Co., Ltd.* (D.C.S.D. N.Y.) 186 F. Supp. 193 (1960).

There is no doubt that under the evidence adduced herein the S.S. Hastings was unseaworthy at the time of the accident in question, that respondent failed to provide libelant with a safe place to work and also that respondent's negligence was the proximate cause of the accident and that therefore respondent is liable for the damages suffered by libelant.

-II-

As to the exceptive allegations there is nothing in respondent's memorandum which would justify changing my ruling at the termination of the trial.

The libel unquestionably states two good causes of action as to which the court, on the basis of the evidence adduced

at the trial, has ruled that respondent is liable to libelant on the grounds stated above.

As regards laches and the plea of limitations, the evidence shows that libellant in 1957, long before the one year period invoked by respondent had elapsed, consulted attorney Cole, and signed a contract retaining him as his attorney to bring the suit; that Cole left for New York and did not contact libelant for some time until late in 1958 when libelant contacted attorney Feldstein and asked him to straighten up the situation with Mr. Cole and take his case.

But even if the above were not to be considered as sufficient by itself to meet the defense of laches, still there are other factors that the court must consider in order to give due application to the said equitable doctrine.

As stated by the Supreme Court in *Gardner v. Panama R. R. Co.* 342 U.S. 29:

"Where no prejudice to the defendant has ensued from the mere passage of time, there should be no bar to relief".

The evidence adduced at the trial herein amply shows that the accident report, the names of witnesses, the records of the medical treatment received by libelant on account of the accident in question, payrolls and other records of the stevedoring contractor, including those relating to the unloading operations of the S.S. Hastings on the voyage on which the accident occurred, were duly preserved and kept since the date of the accident until the day of trial. All these records fully gave respondent all the data it needed for its defense. Indeed respondent itself offered most of those records in evidence.

It must, therefore, be concluded, as I hereby conclude that no prejudice to the respondent has ensued from the mere passage of time; that libelant's delay in bringing his action is no bar to his request for relief and that respondent's exceptive allegations, based on laches and limitation must be denied.

-III-

The damages.

As regards libelant's loss of earnings while he was being treated for the injuries caused to him by the accident in question, they amounted to $250.00, i.e., five weeks he was out of work, at the rate of $50.00 per week.

Now the task of ascertaining his other damages is not so simple.

This libelant had previously suffered an injury to his back in 1951, also working as a longshoreman and had been out of work for a period of 6 months on that account. Nevertheless he had been declared totally cured and discharged from further treatment by The State Insurance Fund. Thereafter he went back to work, first as a carpenter and later as a longshoreman.

The expert medical testimony of Dr. Rifkinson, witness for the libelant, as well as that of Dr. Ramirez de Arellano, witness for the respondent was to the effect that the libelant had recovered completely from said 1951 accident.

In 1956 he suffered the accident here in question.

Dr. Rifkinson testified that as a consequence of this 1956 accident, libellant sustained a herniated disc and that the 1951 accident played no role in said condition.

Dr. Ramirez de Arellano, medical expert testifying for the respondent was in complete agreement with Dr. Rifkinson as to the latter's diagnosis of herniation of the intervertebral disc at 14, 15, as the condition from which libelant is suffering at present.

Now, after the 1956 accident involved herein, libellant suffered a fall in 1958 which had no visible consequences in his then physical condition and in 1959 he suffered another accident which somewhat aggravated the symptoms occasioned by the 1956 accident.

The above two medical experts had not examined libellant

contemporaneously with the 1956 accident. They both examined him after the 1959 accident had taken place.

No other doctor, except Drs. Iguina, Bayonet and del Prado had examined him after the 1956 accident and before the 1959 occurrence.

Dr. Iguina's testimony is of no help. Although he indulged in generalizations as to libellant's physical condition after the 1956 accident, he did not have any records with him and was unable to base his assertions on any physical findings made either by him or by any other physician.

Dr. Bayonet's testimony was even less positive than Dr. Iguina's.

Dr. del Prado had merely made a routine medical examination in connection with a job application by libellant, in 1958. He claimed that he had made another physical examination of libellant in 1958 in connection with an occasion on which the libelant admitted he had not suffered any injury. This doctor brought no notes, or records, although he had been previously subpoenaed to testify as to the history he received from libelant in 1956. He further admitted that he never even took from libelant the history of any of his accidents. Neither does it appear from his testimony that he examined the libelant in connection with the injuries he suffered in 1956.

So the only expert medical testimony to which the court may and has given full consideration is that of Dr. Rifkinson and Dr. Ramirez de Arellano.

Both agree that the 1951 accident has no bearing on libelant's present physical condition. Both also agree that said physical condition is, primarily, the consequence of the 1956 accident here in question and that the 1959 accident did not cause that condition, but may have somewhat aggravated the same. They both also agree that libelant is permanently incapacitated unless he submits to surgery,

but neither of them can guarantee that surgery will be successful.

There is no evidence of the reasonable value of such surgery.

Beyond question libelant is presently suffering great physical pain and mental anguish. He is only 51 years old and has a normal working expectancy of not less than 14 years. Even if he undergoes surgery and this is successful, still he will remain with a permanent residual loss of motion and function.

In view of all the above considerations and having in mind libellant's loss of earnings, his pain, mental anguish, incapacity, necessity for surgery and absence of assurance that this be successful, the residual incapacity that would remain, even if surgery is successful, the period of four years during which he has endured the symptoms and the 14 years of working expectancy, and further considering whatever impact the 1959 accident may have had towards aggravating libelant's injuries resulting from the 1956 accident, the court believes that a fair and reasonable compensation for libellant's all other damages is the sum of $18,000.00.

Had it not been for the impact of the 1959 accident libelant would have been entitled to much more.

A decree in accordance with the above considerations shall be rendered in due course.

Counsel for libelant is directed to submit, within a period of 15 days from the date of notice of this memorandum proposed findings of fact, conclusions of law, and form of decree, serving copy thereof to counsel for respondent, who shall thereafter have a like period to submit objections and amendments thereto.

San Juan, Puerto Rico, December 29, 1960.

(s) CLEMENTE RUIZ NAZARIO
United States District Judge

FINDINGS OF FACT

1. The respondent, Waterman Steamship Corp., owned and operated the vessel "SS HASTINGS" on October 21, 1956.

2. On that date the vessel was berthed in the port of Ponce, Puerto Rico where she was discharging cargo.

3. Libellant, a longshoreman employed by an independent stevedoring contractor, was working on the apron of the pier alongside the vessel, assisting in the discharging operations from hold #2 forward.

4. The cargo being discharged was composed of foodstuffs mainly beans which were packed in bags.

5. Many of the bags were broken and defective. Coopers were working aboard the vessel and on the pier sewing sacks prior to and during the unloading operation.

6. Despite the work of the coopers, beans had been observed spilling from the drafts as they were unloaded from the vessel, throughout the operation. On one occasion, according to the records produced by respondent and admitted into evidence, a bag broke open in mid-air spilling its contents all over the dock. This event occurred while a draft from Hold No. 1, was in mid-air and still attached to the vessel. Hold No. 1 is immediately adjacent to No. 2 forward.

7. Beans scattered about the surface of the pier caused a dangerous condition for the longshoreman.

8. The cargo being discharged was defective and unseaworthy.

9. The shipowner was negligent in permitting the broken and weakened bags to be discharged, when it knew or should have known that injury was likely to result to persons in the service of the ship who had to work on and about the spilled beans.

10. The condition on the pier, was caused by the respondents' unseaworthy cargo and its lack of care. In permitting

this condition to remain existent, the respondent failed to furnish libellant with a safe place to work.

11. While working on the dock libelant slipped on the beans, twisting his torso and fell upon his buttocks.

12. The injuries received by libelant were proximately caused by this unseaworthiness of the vessel, the failure to furnish libelant with a safe place to work and by the negligence of the respondent.

13. The analogous statute of limitations for a like action brought in Commonwealth of Puerto Rican courts would have expired on November 30, 1957.

14. Action was commenced in the United States District Court for the Southern District of New York on or about January 9, 1959, or more than thirteen months after the expiration of the analogous statute of limitations.

15. In order to excuse laches libelant pleaded that the respondent was not prejudiced by the delay. The libelant did in fact contact counsel within the analogous period of limitation.

16. Payroll records of the stevedore indicated who were the potential eye-witnesses, all of which were produced by libellant. The payroll records themselves were produced by respondent. The accident report filed by the stevedore also named the witnesses and formed part of the file of the State Insurance Fund which was at all times subject to subpoena by the parties. The respondent itself produced records indicating the cargo damage prior to and at the time of discharge, medical records indicating the nature of treatment and the names of the treating physicians were also available, as were the physicians themselves. The respondent caused a deposition to be taken of libelant and submitted extensive interrogatories which were answered. Finally, the respondent availed itself of a physical examination of the libelant. From these facts, I conclude that no prejudice to the respondent has ensued from the delay of libelant in filing this action.

17. Although he sustained a prior back injury in 1951, libelant had completely recovered therefrom long before the injury sustained on November 21, 1954.

18. As a result of the injury while working alongside the "SS HASTINGS" libelant was hospitalized for a period of several days and under treatment for a period of five weeks during which time he was incapacitated for work and lost earnings of $250.00.

19. The libelant returned to work thereafter and on July 31, 1959 suffered another injury or relapse and has since this latter date been totally incapacitated.

20. The libelant is now suffering from a herniated intervertebral disc at the level between the fourth and fifth lumbar vertebrae which causes him physical pain and mental anguish.

21. This condition is a result of the accident of October 21, 1956, aggravated by the accident of July 31, 1959.

22. Unless he submits to surgery the libelant will remain permanently incapacitated. There is no assurance that surgery will be successful or relieve the symptoms. Even if surgery is successful, the libelant will be left with a residual loss of function and motion of the back.

23. The libelant has a working expectancy of fourteen years. Although he has not returned to work since July 31, 1959, even if he should, his earning potential has been greatly diminished. For his loss of earnings, present and prospective, I conclude that reasonable compensation of $8000.00 may be attributed to the condition directly related to the October 21, 1956 occurrence.

24. For his pain and suffering, permanent incapacity and mental anguish, past and future, I conclude that reasonable compensation for that portion of these damages attributable to the 1956 occurrence, is $10,000.00.

25. No award is made for the reasonable value of medical expenses or for the cost of prospective surgery because

sufficient evidence has not been presented upon which such an award may be made.

26. The libelant was not guilt of any contributory negligence.

CONCLUSIONS OF LAW

1. The Court has jurisdiction over the parties and the subject matter. 46 U.S.C.A. 740.

2. The broken and defective condition of the cargo rendered the vessel unseaworthy. *Valerio* v. *American President Lines*, 112 F. Supp. 202.

3. The libelant is a member of the class of persons to whom the shipowner owes a duty of providing a seaworthy vessel. *Sea Shipping Co.* v. *Sieracki*, 328 U.S. 85, 66 S. Ct. 872, 90 L. Ed. 1099.

4. This duty extends to damages which occur or are consummated on land. *Strika* v. *Netherland Ministry of Traffic*, 185 F2d 555.

5. The unseaworthy condition aboard the vessel was a proximate cause of libelant's injury ashore. *Revel* v. *American Export Lines*, 162 F. Supp. 279, *Robillard* v. *A.L. Burband & Co., Ltd.*, 186 F. Supp. 193.

6. The respondent was also negligent in failing to furnish libelant with a safe place to work and in creating a dangerous condition ashore. *Marceau* v. *Great Lakes Transit Corp.*, 146 F2d 416.

7. The respondent had notice, either actual or constructive of the condition it had created. Even, if it had no such notice, it would not be relieved of its duty to furnish a seaworthy vessel. *Mitchell* v. *Trawler Racer, Inc.*, 362 U.S. 539, 80 S. Ct. 926, 4 L. Ed. 2d 941.

8. The libelant was not contributorily negligent.

9. Laches does not exist, by virtue of the fact that respondent was not prejudiced by the delay. *Gardner* v. *Panama R.R. Co.*, 342 U.S. 29.

10. An award in the total sum of $18,250.00 will reason-

ably compensate libellant for his loss of earnings, past and future, his pain, mental anguish, incapacity and necessity for surgery, allowing for whatever impact the 1959 accident may have had towards aggravating libelant's injuries.

DECREE

The above entitled action came on for trial before me on March 21-23, 1960 at San Juan, Puerto Rico and libelant and respondents appeared in person and by their proctors and testimony having been offered and briefs having been filed by both parties and the Court having filed its memorandum of December 29, 1960 and thereafter its findings of fact and conclusion of law, in accordance with Admiralty Rule 46 1/2 on May 3, 1961, now pursuant to said memorandum and said findings of fact and conclusions of law, it is hereby

ORDERED, ADJUDGED and DECREED that the libelant Federico Marín Gutierrez have judgment against respondent in the sum of $18,250.00 with interest at the rate of 6% per annum from the date of the entering and signing of this decree until paid, and for his costs and disbursements in this action to be hereinafter taxed on notice.

San Juan, Puerto Rico, May 3, 1961.

(s) CLEMENTE RUIZ-NAZARIO
United States District Judge

Please take notice that WATERMAN STEAMSHIP CORP., the respondent in the above entitled cause, hereby appeals to the United States Circuit Court of Appeals for the First Circuit from the final decree of this court entered herein the 3rd day of May, 1961, and from each and every part of said decree.

San Juan, Puerto Rico, June 1, 1961.

HARTZELL, FERNANDEZ & NOVAS
By: (s) ANTONIO M. BIRD
Proctors for the Respondent

STENOGRAPHIC TRANSCRIPT OF TRIAL

[6] FEDERICO MARIN GUTIERREZ the libelant in the action, was called as a witness on his own behalf and upon being examined testified as follows:

Direct Examination

[7] A. After those carts are filled they are taken away.

Q. How is the sling disconnected from the cable of the ship? A. That has a hook. The loop is taken off of the hook, and the draft then remains there.

Q. Who takes the loop off the hook? A. The two men working on the apron, that is, my partner and me.

Q. Do you remember the name of the ship you were discharging that day? A. I don't remember exactly.

Q. At what time did you start working on that day? A. At 7:00 in the morning.

Q. What hold were you assigned to? A. To the No. 2 forward hold.

Q. Who was your foreman, if you remember? A. We don't know the name of our foreman, because they select some foremen and send them inside the pier.

Q. Who was your companion that day? A. Carmelo Fraticelli.

Q. What sort of cargo were you unloading from the vessel? A. General cargo. We were unloading beans, corn, feed, rice, lard, all of that stuff.

Q. At what hour did your accident happen? [8] A. From 3:00 to 3:30 in the afternoon.

Q. How did your accident occur? A. The accident occurred this way. As they were lowering the sling loads from the ship, there were broken bags and as they came out of the ship they would spill beans and some of everything they were bringing, on the platform.

Q. What happened? A. At 3:00 or 3:30 the draft was coming down and when I was about to receive it on the cart I slipped and fell seated on the platform.

Q. Was the sling still attached to the hook when you fell? A. Yes, sir, it was.

Q. And how did you fall? A. I fell like this, and fell on this side over here.

(Pointing to the right side.)

Q. Were you able to get up by yourself? A. No, I couldn't.

Q. How did you get up? A. The fellow worker who was at hold No. 2 aft, since the two holds are close together, he came and helped me to get up.

Q. Do you remember his name? A. Yes, Manuel Quirindonga Cintron.

Q. What did you do after he lifted you up? A. Then they stood me up by the door of the pier and then I sat down to see if the pain would go away a little.

[9] Q. And then what happened? A. Then my partner finished the draft with the help of Cintron, and then Cintron helped to get me over to where the foreman was inside the pier to go over to the minor surgeon to fill out the report.

Q. And did you fill out the report that day? A. Yes, I did.

Q. And what did you do after you filled out the report? A. Since it was late, I waited until the next day. I went home.

Q. What did you do the next day? A. I went to the Dr. Pila Clinic, in Ponce, the next day.

Q. What did they do for you in Dr. Pila's Clinic? A. They took a sample of urine and then they took some X-Rays, and they isolated me.

Q. When you say they "isolated" you, do you mean you were placed in bed? A. Yes.

Q. And how long did you stay in bed? A. I was in bed 11 days.

Q. What was done for you during those 11 days? A. They put hot water bags here and on my back. They gave me some tablets. That lasted for 11 days.

Q. And after the 11 days, what did you do, Mr. Marin? [10] A. After 11 days, they discharged me from bed rest and gave me treatment.

Q. And how long did you remain under treatment? A. A month after the termination of the 11 days.

Q. And during these 11 days, and this month, did you have any pain? A. Yes.

Q. Where did you have that pain? A. From here down, all over my leg.

Q. Which leg? A. The right leg.

Q. After the month, were you authorized to go back to work? A. I went back to work.

Q. Did you feel at that time that you were able to work? A. Well, I didn't feel in a condition to work.

Q. Did you appeal that decision of the Insurance Fund? A. Yes, I did appeal.

Q. And I take it that the original decision was affirmed? A. Yes, the other decision was affirmed.

Q. After you went back to work, Mr. Marin, did you continue to have any pain? A. Yes, I felt considerable pain in my legs.

Q. For how long did that continue? A. I still have pain. I have never lost the pain.

[11] Q. Now, Mr. Marin, when was the first time that you consulted an attorney about this case? A. Around 1957.

Q. And which attorney did you consult? A. Attorney Cole, who went over to our Union Hall to see what cases were over there.

Q. And after you consulted Mr. Cole, did you sign a re-

tainer with him to give him the case? A. A lot of time went by.

The Court: No, the question was, if you signed any paper to retain Mr. Cole?

A. Yes, I signed some papers to give him the case.

Q. And what was the next thing you heard from Mr. Cole? A. That he had left the country, and he hadn't gone back to the Playa Ponce for a long time. And then you men arrived in 1958.

Q. And who did you see in 1958, and where? A. I saw Mr. Feldstein at the Playa, at Ponce.

Q. And did you have a conversation with him at that time? A. Yes, and then he spoke to me about my case.

Q. And what did he tell you? A. Then he told me he would not care to take the case as I had already handed it to another attorney.

Q. And what did you do then? A. I told him then that I had given the case to another [12] attorney but he had left the country and I hadn't heard any more from him.

Q. And what did Mr. Feldstein tell you? A. Then he told me he would see if he could do it.

Q. What did he do, if you recall? A. About a month or a month and a half later, he went back to the Playa. Then he told me that Mr. Cole had handed him several cases of ours, that he had.

Q. And was your case included? A. And that among those several cases he had given him was my case.

Q. And when did this conversation with Mr. Feldstein take place? The first or the second, if you remember? A. About the middle of 1958.

Q. Mr. Marin, did you ever have any trouble or injury to your back before 1956? A. Yes, in 1951 I suffered an injury in my back.

Q. And how long were you out of work as a result of that accident? A. About six months.

Q. And after six months, were you authorized to go back to work? A. Yes, and I worked.

Q. Where did you work? A. I worked aboard a ship of the Ponce Cement Corporation; a cement ship.

[13] Q. And when you went back to work after the 1951 accident, did you have any pains? A. I felt a slight pain in my back, but as time went by the pain began to fade away.

Q. After you went to work for Ponce Cement, where did you work thereafter? A. I worked at the Union Carbide Company, as a carpenter.

Q. And how long did you work as a carpenter? A. I worked considerably. I would work over there, finish my shift, and then come over to the pier to work.

Q. Was there a time that you were away from the piers entirely? A. No. Since they worked by the shift system, no, sir.

Q. Between the time you worked for Ponce Cement and the time you went to work at Union Carbide, did you work anywhere else? A. No, at the pier.

Q. And during all that time, did you have any pain? A. No. I worked at the Carbide, and in order to work at the Carbide I had to take a medical certificate. Then they sent me to Dr. Pila Clinic to get a certificate, and Dr. del Prado certified that I was in a completely good condition to work.

Q. And when was that? A. This was between 1953 and 1954. I don't remember the [14] exact date.

Q. And I show you, pointing in the court room, when you mentioned Dr. del Prado's name, is Dr. del Prado in the court room? A. Yes, he is the gentleman sitting back there.

Mr. Nachman: You are Dr. del Prado?

A spectator sitting in the court room: Yes.

Q. Up to the 1956 accident, Mr. Marin, did you have any

pain whatever in your legs? A. No, sir, I felt pretty well. I was working.

Q. You were also working after 1956 though, weren't you, Mr. Marin? A. Yes, I worked.

Q. And did you have any pain when you went back to work after the 1956 accident? A. I had to quit working as a carpenter because I couldn't stand it.

Q. How much did you earn as a carpenter? A. $10.00 daily. $1.25 an hour.

Q. And how much did you earn during the year as a carpenter? A. Working every day, at $10.00, I charged $50.00 a week.

Q. And was that every week during the year? A. Yes, except for the days when I had a shift at the pier which I had to go and work.

Q. Now, after your accident in 1956, did you have any [15] further injury to your back thereafter? A. Yes, after 1956, I had one in 1959.

Q. What happened in 1959? A. In 1959 while working for Alcoa about 4:00 in the morning we were receiving sling loads of milk.

Q. And what happened? A. When the sling load came down I went to receive it and then my right leg gave way under me, but then I grabbed the sling load and held on to it. I didn't fall to the floor.

Q. And after that did you receive treatment for that condition in the Fondo? A. Yes, sir.

Q. How long did you receive treatment? A. Well, I made that false step in July 1959, but I don't remember the exact date. I know that was in July. I think it was the 30th of July.

Q. Where did you have pain after the 1959 occurrence? A. I have always had pain in my legs. It's always remained with me, and also in my waist.

Q. Did the pain get worse after the 1959 accident? A. Well, that aggravated it considerably.

Q. And have you been advised that you need any other kind of treatment? A. I have been advised to get an operation.

Q. Who gave you that advice? A. The Doctor of the Commission. I don't know his name. [16] There are two doctors now. The dark complexioned doctor. He said he was going to advise me and give me an order for an operation. Then the dark doctor told me that if I got an operation I would be worse than I was before.

The Court: What was the name of that doctor?

A. I don't know the name of that dark doctor. He is a fat man over at the Industrial Commission.

The Court: Garcia Estrada?

A. I think that's his name.

Q. What did this doctor tell you, exactly? A. A tall white man that was there asked me whether I wanted an order for an operation, that he would give it to me.

Q. What did the other one tell you? A. The other one told me I would be in the same condition because I would never get rid of the pain, whether I got an operation or not.

Q. Did you refuse the operation, or did they never order it? Which was it? A. They have the order, the letter for the operation. I know they sent the letter to my house.

Q. And have you refused to have the operation up to now? A. Yes, because I am willing to be operated on if I would be made whole again, but if it does not do any good, I don't want any operation.

Mr. Nachman: Your witness.

[17] *Cross Examination*

By Mr. Rout:

XQ. Mr. Marin, after your injury did you speak to a representative of your employer? A. Yes.

XQ. Did you tell him what happened? A. I explained to him and then they gave me some blanks.

XQ. What did you tell him? A. I told him what had happened, that I received that sling load, that I had slipped and fell sitting on the platform.

XQ. Did you say anything else? A. I told him I had a severe pain and then he told me to report, and then he gave me the blanks.

XQ. Did you make a sworn statement to the State Insurance Fund, about your injury? A. Yes, sir.

XQ. What did you tell them happened? A. I told them that when I attempted to receive that draft I had slipped and fallen, sitting down.

XQ. Did you continue to work after you were injured? A. Yes, after I was definitely discharged as being able to work, I had to work.

XQ. I mean, the day of your injury, immediately after the injury, did you get up and continue to work? A. No, the boat was finishing work already.

[18] XQ. In that sworn statement, did you state to the State Insurance Fund at what time you were injured? A. Yes, from 2:00 to 3:30.

XQ. I would like to have this marked as Identification 1 for respondent?

SWORN STATEMENT OF LIBELANT WAS MARKED IDENTIFICATION 1 FOR RESPONDENT.

XQ. I will show this Identification 1 to proctor for libelant.

Mr. Nachman: No objections.

XQ. Does this Identification 1 purport to bear a signature? A. Yes, mine.

XQ. And what is this document? A. This is a sworn statement.

XQ. I would like to offer Identification 1 in evidence as respondent's Exhibit 1.

Mr. Nachman: I have no objections.

The Court: It is admitted and ordered marked Exhibit 1 for respondent.

SWORN STATEMENT OF LIBELANT WAS ADMITTED IN EVIDENCE AND MARKED EXHIBIT 1 FOR RESPONDENT.

Mr. Rout: Let the record show I am indicating a question that was apparently asked.

The Court: Why don't you quote from the question for the record? Is it in Spanish?

Mr. Rout: Yes.

[19] The Court: You read the question in Spanish.

The Interpreter: When the accident occurred, what did they do with you?

Mr. Rout: And I would like to have the answer read. I would like to have the question and answer read to the witness and then I will ask questions.

The Interpreter: "When that accident occurred, what did they do with you?" Answer: "Well, I held on until 3 1/2 and went to the office to fill out the blanks and later the minor surgeon sent me over to Dr. Pila's Clinic." You answered that?

A. Yes.

XQ. You worked for 3 1/2 hours after you were injured that afternoon? A. No, I stayed there and my fellow workers helped mt to work.

XQ. Do you recall that your deposition was taken on oral examination on August 21, 1959? A. Yes.

XQ. Do you remember being asked at what time you started to work? A. Yes.

XQ. Do you remember what your answer was? A. At 7:00 in the morning.

XQ. And do you remember being asked at what time the accident occurred? [20] A. From 3:00 to 3:30.

XQ. I would like to have the original deposition which is on file.

Mr. Nachman: Which page are you reading from?

Mr. Rout: From page 5 of the deposition.

The Court: Let the record show that the Deputy Clerk opens the envelope on which the deposition was transmitted to the Clerk, and withdraws the original deposition from the envelope.

Mr. Rout: I would like to show the witness page 5 of the deposition, and ask—

The Court: Have it marked for Identification. It will be Identification 2 for respondent.

Mr. Rout: The entire deposition, please? I would like to offer the deposition as Exhibit 2 for respondent.

Mr. Nachman: No objections

The Court: It is admitted and ordered marked Exhibit 2 for respondent.

DEPOSITION OF THE WITNESS WAS ADMITTED IN EVIDENCE AND MARKED EXHIBIT 2 FOR RESPONDENT.

XQ. I would like to read the first 2 questions and answers to the witness. "At what time did you start working?" Answer: "At 7:00 in the morning." Question: "At what time did the accident occur?" Answer: "Between 11:00 and 11:30." Is that the true answer? [21] A. It was between 3:00 and 3:30.

XQ. Then, you didn't tell the truth at the deposition, is that right? A. If it was written down like that, then that's because they wanted to write it that way, but I said from 3:00 to 3:30.

XQ. Did you read this deposition before you signed it? A. I never read it. They just gave it to me to sign.

XQ. At page 8 of the deposition, you were asked the question, did you continue working after your injury?

The Court: I want to have the original deposition.

XQ. And your answer was, "The same day, you mean?", and the question was "Yes", and your answer was "Yes, I worked until 4:00." Is that true? A. That was because

I did not go out of the place. I had to stay there to go to see the minor surgeon, and my fellow workers were there helping me until the ship finished. I could not continue working, receiving any drafts.

XQ. Did you tell the truth when you said you continued to work, after your injury that day? A. Well, because while I was there I was getting paid for it, and while you are getting paid you are working.

XQ. At that sworn statement, you were asked this question. "At what time was it that this accident happened?" and to that question you gave the following answer. "At 10:00 in the morning." [22] A. No, I said from 3:00 to 3:30 in the afternoon, because it was the next day that I went to the clinic in the morning, because it was already too late.

The Interpreter: The question and answer in the sworn statement are: "At what time did that accident occur?" "At 10:00 in the morning."

XQ. Do you remember the date that you made that statement, Mr. Marin? A. That's the State Fund statement?

XQ. Yes? A. I never gave that statement to the State Fund.

XQ. I would like to show the witness the date of that statement. What's the date of that statement? A. Is this November 29, 1956?

XQ. Did you make this statement to the Fondo? A. I didn't give that statement to the Fondo. Because I made it in October.

XQ. Did you sign this statement? A. Yes, I did sign this one. I was injured on 21 October 1956.

XQ. When you went to see the doctors at the Fondo, after your injury on October 21, 1956, did you tell them that you were suffering from pain? A. Yes, sir.

XQ. What did you tell them? A. I said that I suffered

severe pain in my right leg, [23] up to my waist. In this part here. All of this.

XQ. Is there anything else that you told them? A. No, my leg and all of this.

Mr. Rout: Let the record show he is indicating his right hip area, is that correct? I would like this marked as respondent's Identification 3. This is the report of the accident. And this will be respondent's Identification 4, which is the medical report.

THE ACCIDENT REPORT WAS MARKED IDENTIFICATION 3 FOR RESPONDENT.

A MERICAL REPORT WAS MARKED IDENTIFICATION 4 FOR RESPONDENT.

Mr. Nachman: I object.

The Court: Any of the exhibits that are in the Spanish language are admitted conditionally. You will have to furnish translations.

Mr. Rout: I would like to offer in evidence as respondent's Exhibit 3, the accident report filed with the State Insurance Fund on October 21, 1956, in connection with the injury of libelant. It has been stipulated between—

Mr. Nachman: I object to the admission of the accident report unless I know first for what purpose it is being admitted. I don't believe that the report, signed by somebody that wasn't brought here, is anything more than a hearsay document by the employer. I don't know what purpose it is [24] being brought here for, but if he tells me for what purpose it is brought—

Mr. Rout: This was stipulated as being a part of the State Insurance Fund records.

Mr. Nachman: It is part of those records, certainly, but that does not mean it is all admissible.

The Court: What's the purpose of offering this? If it is to impeach the testimony of the witness as to the hour of the accident—

Mr. Rout: It is to impeach the witness as to the pain he complained of at the time of the accident, and the medical report as the conclusion of the Fondo after the medical examination.

Mr. Nachman: Who is it signed by?

Mr. Rout: One part by Dr. del Prado, and the other by Mr. Gil.

The Court: If this is the report, it must have been made by somebody on the part of the employer. The signature of the libelant isn't here. And the man who prepared this report must testify. It is hearsay. Indeed, it has some names which have been deleted and some other names put over them. I don't believe I can admit that as coming from the—

Mr. Rout: I understand that this is an official report required to be filed by the employer with the State Insurance [25] Fund, with respect to the injury of a workman.

The Court: Well, under the shop book rule, you would be entitled to offer it and it would be admissible. Now, to what extent is different. It is admissible to show that a report was submitted. The law was complied with, and the report was submitted.

Mr. Rout: I will submit the offer of respondent's Identification 3, and offer respondent's Identification 4.

Mr. Nachman: I have no objection.

The Court: Exhibit 3 is admitted under the shop book rule for the purposes already stated by the Court, and ordered marked Exhibit 3 for respondent. And Exhibit 4 is also admitted because no objection has been made.

THE ACCIDENT REPORT WAS ADMITTED IN EVIDENCE AND MARKED EXHIBIT 3 FOR RESPONDENT.

THE MEDICAL REPORT WAS ADMITTED IN EVIDENCE AND MARKED EXHIBIT 4 FOR RESPONDENT.

XQ. You stated, Mr. Marin, that you had a pain in your

right leg at the time of the injury? Is that correct? A. You mean at the time of the 1956 accident?

XQ. That's correct? A. Yes, since 1956.

XQ. Why didn't you tell the doctors that examined you after [26] the 1956 injury that you were suffering from pains in your leg? A. I told them that, yes. That the pain extended down to here. They ordered massage for my leg.

The Court: Of course, those exhibits have been admitted by the Court in the Spanish language, and the admission is conditioned upon your attaching to them a translation into the English language, and that must be done as early as possible. I don't want it to happen, that after an appeal is taken in the case, then the Official Interpreter of the Court has to act in a hurry at the request of one of the parties, in order to have the translation made.

Mr. Rout: All right, Your Honor. I would like to read to you the resume of the examination of the doctor from the State Insurance Fund who examined the witness after this injury.

Mr. Nachman: I object to the characterization. This is a report of an X-Ray examination. The history on the top, there is no evidence that it came from the doctor who took the X-Rays. It is just a resume of the hospital record, and admitted there in the history for what it's worth. But I object to the characterization that it is what you told the doctor. There is no proof of that whatsoever.

The Court: Let me see it. Dr. del Prado is in the court room. You may bring Dr. del Prado if you want to later. [27] As a resume, I don't believe that's admissible for the purposes you indicate. It is simply admissible as part of the hospital record.

Mr. Rout: I will withdraw the further questions as to Exhibit 4 for the present. Referring to your sworn statement of November 28, 1956, do you recall these questions and answers?

(By the Interpreter): "What did you come here today for? I was sent here for examination from over in Ponce. What happened to you? Just as I was about to receive the draft, it seems that the winchman inside hauled the draft up and carried me, and I was carried over and fell on the pavement, and whenn I fell I could not get up because I felt a strong pain in my waist and around the inguina."

XQ. Was that a true answer to that question? A. Because the sling load was swinging back and forth.

The Court: That isn't responsive to the question. He asked whether that was the truth?

A. That's what I said, when I fell. But what happened was that when I went to get the sling load, I slipped on the beans that were on the pavement. Sometimes the draft comes down from the ship swinging back and forth too much, and the two of us are unable to grab hold of it.

XQ. Will you translate the last question?

The Court: He answered that when the Court warned him. He said it is true. It happened this way and that. [28] Yes, he said it is true, he answered that.

XQ. Is it true that you never complained of the injury in your right leg at the time of your injury, did you, Mr. Marin?

The Court: That's another question.

A. Yes, I told the doctor about that. They also massaged me in the clinic they gave me massage. They also massaged my back. They applied a light to my back, on my back, and on my waist.

XQ. Did the abnormal swing of the draft have anything to do with your slipping? A. No. No, since it was necessary to put the draft on the cart, when I went to grab it, I slipped on the beans that were on the floor.

XQ. What did you mean by this statement on November 28th?

Mr. Nachman: I respectfully object. The question, Your

Honor, calls for a state of mind, as it existed in November of 1956. It is obvious that this man's testimony as to what he thought on November 28, 1956 is of no importance in this case.

The Court: They are asking him what he meant by what he said there.

Mr. Nachman: The question is what he meant in 1956 by what he said, and if they ask him what do you mean today, I have no objection.

The Court: Objection sustained. You may change the [29] question—what do you mean by this?

XQ. Mr. Marin, the question is, what do you mean by this answer, here? A. When the draft came down, since we have some carts there it is necessary to position the draft on them, and the draft comes down swinging from side to side, like this. When I tried to grab the sling load, I slipped and fell on the pavement. I didn't even touch the draft because as I reached out for it I slipped. I fell sitting on the pavement.

XQ. What caused you to slip? A. Because the floor was full of grains. There was rice, there was beans, there were peas.

XQ. Why didn't you tell that to the State Insurance Fund when they asked you how the accident happened?

Mr. Nachman: I object to the form of the question.

The Court: What's the materiality of that? His failure to tell that to the State Insurance Fund?

Mr. Rout: The materiality of the question is merely to challenge the man's credibility, because four years after the injury occurred he comes to the Court with a different story explaining how it happened.

The Court: Well, that's there; but if you ask him why he didn't tell that to the State Insurance Fund, that's not going to help the Court as to the credibility of the witness.

Mr. Rout: I don't know what his answer would be. Maybe [30] he would explain the inconsistency.

The Court: No. The fact is he told this to the State Insurance Fund on that date, and then he says he meant this, and now he testifies as to this. That's all I have to consider. I don't care what he intended to state to the State Insurance Fund. Objection sustained.

XQ. How long did you state you were hospitalized, after the injury? A. From the 21st of October until the 11th of November, 1956, until I was definitely discharged with orders that I could work.

XQ. Do you remember being asked at your deposition, "Were you hospitalized as a result of this injury?" Page 8? A. Yes. 11 days.

XQ. Do you remember answering, "I was in the hospital for 2 or 3 days? A. I was there 11 days.

XQ. You didn't tell the truth at the deposition? A. I didn't remember the exact number of days. I remember that between the time I was in the hospital and the time I was an out-patient, I was between the 21st of October and the 28th of November.

Mr. Rout: I would like to have this marked for identification.

The Clerk: Identification 5 for respondent.

[31] EVALUATION REPORT WAS MARKED IDENTIFICATION 5 FOR RESPONDENT.

Mr. Nachman: Are you offering this?

Mr. Rout: Yes.

Mr. Nachman: I respectfully object, Your Honor. This is an evaluation made by a doctor in Ponce for purposes of compensation under the State Insurance Fund, which is an independent method of computation, and for that purpose I object. If he wants to read any medical diagnosis which exists there and shows me which he wants to read, I

have no objection, but as for the determination of compensation, I respectfully object.

The Court: What's the purpose of this? This is simply a letter from Dr. Iguina which says that it does not agree with an evaluation of the doctors in San Juan. And he refers the case back to the doctors to determine what it is all about.

Mr. Rout: Your Honor, one of the important elements of contradiction is the libelant's claim that he stated that he suffered injury to his right leg at the time of this injury, and this is part of the corroborating document, an official record of the State Insurance Fund, which summarizes the interviews with the libelant.

The Court: As to that, I don't believe it is admissible. I believe it would be hearsay. He does not state that the libelant told him that he did not suffer any pain.

Mr. Rout: This is a part of the official medical record, [32] Your Honor, and I think whatever logical inference that could be drawn therefrom should be before the Court.

Mr. Nachman: This isn't part of the medical record. It isn't done for the purposes of treatment at all.

The Court: Objection sustained.

XQ. Do you recall in the written interrogatories being asked, Mr. Marin, the dates during which you were confined to a hospital? That's interrogatory number 3-A? A. I don't remember exactly.

XQ. And do you recall answering that question, "I was confined to the hospital from October 22 to October 25, 1956? A. I said from the 21st of October to the 11th of November when I was definitely discharged from everything, from going to the hospital and everything.

XQ. Please answer the question, Mr. Marin? A. Well, I don't know exactly how that statement is.

XQ. Did you also state in your answer to interrogatory 3-D that you were unable to work for five weeks? A. I

answered that I couldn't work until I was definitely discharged from the clinic.

XQ. Mr. Marin, you stated that after your 1956 injury, you suffered one more injury to your back. Is that the truth? A. In 1959.

XQ. That was the only one, is that correct? A. 1959.

XQ. And you would remember if you had suffered any other [33] injuries to your back after 1956, wouldn't you? A. No. In 1956 I didn't receive any injury to my back. After 1956 I remember in my waist and my back I had not received any injury until 1959.

XQ. Do you recall working for the Brown-Root Company? A. Yes.

XQ. Did you suffer any injury while you worked at the Brown-Root Company? Answer the question, please, Mr. Marin? A. I received an injury but it was a slight injury, inasmuch as the next day I went back to work.

The Court: What was that company?

Mr. Rout: The Brown-Root Company.

A. I was working as a carpenter there.

XQ. So you didn't tell the truth, did you, Mr. Marin, when you said you suffered only one injury to your back? A. Because I didn't get any back injury at all. I did not fall down in the accident I had with Root. The only thing that happened was that while I was lifting up a cart, this foot went into a hole. Then the continental sent me to the clinic to be checked. Since I didn't have anything wrong with me, I went back to work the next day.

The Court: Unless there is any special reason to continue with this examination, we will now take a recess for lunch until 2:00 P. M.

(The noon recess was then taken.)

[34] The trial of the above entitled action was resumed at 2:15 in the afternoon, pursuant to the taking of the lunch recess. All parties and their counsel were present as before.

Cross Examination-Continued:

By Mr. Rout:

XQ. Do you remember being examined by Dr. del Prado, Mr. Marin? —A. On what date?

XQ. I want to know whether you remember being examined by him at any time? A. Yes, he examined me, but I don't remember when.

XQ. You stated in direct testimony that in 1953 or 1954 he examined you, is that correct? A. Yes, but that was when the Carbid Company needed carpenters and they required a health certificate.

XQ. Was that the only time you were examined by Dr. del Prado? A. No, since then he has examined me on other occasions.

XQ. On how many occasions? A. I don't remember how many occasions.

XQ. Did he ever give you a certificate of good health, aside from that one time? A. No.

XQ. No, what? A. He didn't give me a certificate. That certificate was [35] for the Carbide Company, but not for me.

XQ. Did you, at any other time, Mr. Marin, require a certificate of good health in order to get employment, aside from the one you are speaking of? A. No, at our union because of the public health question they give examinations. They examine your back, etc., in order to work.

Mr. Rout: Please read the question back?

(The question was repeated by the Reporter.)

A. No.

XQ. All right, that's enough. In fact, that certificate to go to work was for Brown and Root, wasn't it? A. Yes, sir.

XQ. And that examination was in 1958, wasn't it? A. No, that was between 1953 and 1954, when I started to work.

The Court: And it was for Union Carbide?

A. Yes, sir.

XQ. Do you know what kind of work Brown and Root was doing, at the time you were employed by them? A. They were constructing some kind of pipe for a building. The building where they have some machinery now.

XQ. Do you know if they were constructing a plant for the Union Carbide Company? A. I don't know.

[36] XQ. Do you know there was no Union Carbide in 1953 or 1954, in Puerto Rico? A. I don't know, because we were making some excavations. First they would make a foundation of wood, and then pour concrete into it. That was in 1952 to 1954.

XQ. Will you answer the question, please?

The Court: He answered before, and then he explained.

A. I don't remember the exact date.

XQ. How long had you been working for Brown and Root, prior to the time you were injured in 1958?

Mr. Nachman: I object to the question. The question was out long he had been working for Brown and Root prior to the time he was injured. He said he stepped in a hole, but since there was no injury he went back to work the next day. He denied there was an injury in 1958, and was not out of work a day.

The Court: Objection sustained.

XQ. How long had you been working for Brown and Root prior to the time, on March 25, 1958, when you stated you stepped into some soft ground and had to go to the doctor, or were sent to the doctor? A. I don't remember exactly.

XQ. Approximately? A. I didn't work continually.

XQ. Approximately, when did you start to work? [37] A. I don't know more or less, or exactly.

XQ. Two years? A. A little over a year, because I worked at both places. I worked at the pier and over there.

XQ. Was it after this 1956 injury that you went to work for Brown and Root? A. No, it was before.

XQ. Before your 1956 injury? A. Yes, before.

XQ. How long before? A. I have already said 1953 or 1954.

The Court: Wasn't that with Union Carbide?

A. No, I don't know. Some people called it Brown and Root, others Union Carbide. That was in the digging of an excavation to start out that job.

Mr. Rout: I would like to have this report marked for identification.

The Court: This is Identification 6 for respondent. No objection?

A REPORT FILED WITH THE STATE INSURANCE FUND WAS MARKED IDENTIFICATION 6 FOR RESPONDENT.

Mr. Nachman: He hasn't offered it yet.

Mr. Rout: I am now offering as respondent's Exhibit 6, the information report,—

Mr. Nachman: I object, Your Honor.

[38] XQ. filed with the State Insurance Fund in connection with an alleged accident of the libelant on March 25, 1958. It has already been stipulated that this is the official record of the State Insurance Fund.

Mr. Nachman: This is a record, as he admits, filled out by the employer. The State Insurance Fund isn't in the business of filling out forms for the employees, and neither is Brown and Root in the business of filling our reports. If he wants to say this man reported an accident to Brown and Root, it is his onus to bring somebody to state that he had reported an accident.

Mr. Rout: I am not trying to establish a case on this document. I am merely offering it because it is an authentic record in the offices of the State Insurance Fund, that it contains certain information certified to by the employer of the libelant in this case, and whether or not it is established beyond a reasonable doubt as to an issue involved in this case is another matter entirely.

Mr. Nachman: For the records made by the State Insurance Fund it certainly may be admissible, but certainly not for the records made by somebody else is it admissible.

The Court: I believe you are trying to limit the shop book rule. It isn't the records they make, but the documents they file in those records.

Mr. Nachman: This isn't necessary either for treatment [39] or any other purpose. It is a report filed with the State Insurance Fund.

The Court: This is to impeach the witness as to the fact that the accident happened in 1958, and not in 1954?

Mr. Rout: Yes, Your Honor.

The Court: Objection overruled.

Mr. Nachman: He admitted it happened in 1958.

The Court: He said it was 1953.

Mr. Nachman: No, he was asked when did he start working for Brown and Root, and he said Brown and Root and Carbide are the same, but he admitted before the luncheon recess that this happened in 1958, that this happened in 1958 that he was sent to the doctor by his superiors.

The Court: I am going to admit this to show that Brown and Root reported an accident for this libelant at such and such a date.

Mr. Nachman: I concede that.

Mr. Rout: This man testified that in order to go to Brown and Root he had to pass an examination, and that he was employed at that time by Brown and Root. This particular document has the question in it, how long has this employee been working for you, and his answer is 3 months, and it is to the credibility of the witness also.

Mr. Nachman: Again, he said his work was completely irregular. I don't understand how a document such as this [40] can impeach his credibility. I don't understand how this impeaches anything he said. He admitted that he worked for Brown and Root.

The Court: This is up to the Court. It is admitted and ordered marked Exhibit 6 for respondent, subject to having the translation incorporated into the record.

REPORT FILED WITH THE STATE INSURANCE FUND WAS ADMITTED IN EVIDENCE AND MARKED EXHIBIT 6 FOR RESPONDENT.

XQ. I am going to read to you question 12, and the answer to it, of this information report filed by your employer Brown and Root.

The Court: For the purposes of the record you had better translate this question into English for the record, and then read it in Spanish.

The interpreter (reading): 12. How long has he worked for you? Three months.

XQ. Was your employer telling the truth when he made that statement?

Mr. Nachman: Objection.

The Court: Objection sustained. It is a conclusion of the witness. You are asking for a conclusion that is for the Court to say. You may ask whether that was true or not.

XQ. Mr. Marin, was it true that you were working for 3 months for Brown and Root, on March 25, 1958? A. But that was before, and I worked a long time for Brown [41] and Root.

The Court: But the question is this. At the time of that accident, is it true or not that you had been working for Brown and Root only three months at that time?

A. I first worked for Brown and Root, and then I went back to work. I worked at the pier a while, and then I went back to work for Brown and Root.

XQ. What was the first date that you went to work at Brown and Root? A. Between 1953 and 1954, when they began making the foundation excavation.

XQ. What were your gross earnings in 1956, Mr. Marin? A. I don't known exactly, because as I worked at the pier.

The Court: Don't you think that that question, to this witness—? Why don't you ask him how much he was making as a stevedore, and how much he was making as a carpenter all around, and how many weeks he worked? If you make a question like that, which would be a good question for a financier, but not for this man, you won't get the answer correctly.

Mr. Rout: That was brought out on direct examination, but subject to some query in my mind. I wanted to have the opportunity to cross examine him, not necessarily spoon-feed him the answer. I would like to ask the question again.

(The question was read back by the Reporter.)

A. I don't know, exactly.

[42] XQ. Approximately? A. Since we work a shift a week at the pier, in one shift we can make up to $50. Sometimes we make $25.

XQ. Approximately how much in dollars and cents, Mr. Marin? A. You mean, on one shift?

XQ. No, in 1956? A. I can't tell you exactly. I don't have any papers to support that.

XQ. Approximately how many weeks did you work as a carpenter in 1956? A. I didn't work at all in 1956.

XQ. As a carpenter? A. I had already finished working. They had suspended that work and I couldn't go back to work.

XQ. In 1957, how many weeks did you work as a carpenter? A. I couldn't work in 1957. I have my tool box up on the shelf. I can't take it down to work.

XQ. How about 1955? How many weeks did you work as a carpenter? A. I worked several weeks in 1955. I worked at the pier.

XQ. Were you awarded compensation for your 1951 injury?

Mr. Nachman: I object, Your Honor. I don't know what materiality it has.

The Court: What's the purpose of the question?

Mr. Rout: The purpose of the question, Your Honor, is to [43] distinguish between the injury allegedly suffered in 1956 and that in 1951, and the degree of disability fixed as a result of one injury as against another.

The Court: You are going to make the comparison as on the basis of what he says he got in 1951, and 1956? Objection sustained.

XQ. When Dr. del Prado gave the certificate to Brown and Root to enable you to go to work with them, were you feeling in good health? A. Well, he told me I could go to work.

XQ. How did you feel at that time? A. I felt pretty good.

XQ. When was the first time you attempted to commence a lawsuit against the respondents in this case? A. In 1957.

XQ. When, in 19 7? A. Around the middle of 1957. I don't know the exact date.

XQ. At page 7 of your deposition, you were asked the question, "Why did you wait until January 1959 to bring suit against Waterman in this case?" And you answered, "Because I didn't know that I might have a right to claim for my injuries." Were you telling the truth when you said that? A. Well, that's what they asked me, that I gave the case to Mr. Cole when he arrived at the Playa with Freddie in 1957, [44] and I thought of that case as lost already.

* * *

[45] NATHAN RIFKINSON

a witness called by and on behalf of the libelant, after having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Nachman:

Q. What is your name? A. Nathan Rifkinson.

Q. What is your occupation? A. Physician.

Q. Do you have a specialty? A. Neuro-surgeon.

The Court: Do you concede the witness' qualifications as a neuro-surgeon?

Mr. Rout: Yes.

By Mr. Nachman:

Q. Dr Rifkinson, did you examine the witness Mr. Federico Marin Gutierrez?

A. Yes, I did.

Q. When did you examine him? A. Some time in February; I don't recall exactly.

Q. Of this year? A. Yes.

Q. At whose request? [46] A. At your request.

Q. Did you get a history from this patient, Doctor? A. Yes, I did.

Q. Was this vital in any way to your diagnosis? A. No, not to the diagnosis. The diagnosis was fairly obvious.

Q. What sort of medical examination did you make, Doctor? A. A neurological examination.

Q. What would that consist of? A. The examination of the nervous system and the strength of the muscles, movements of the extremities and the sensory testing.

Q. What did you find? A. May I have the report I sent, please? I found that the patient had a loss of the lumbar curve.

Q. What is a loss of the lumbar curve? A. Well, normally the lumbar vertebrae are curved somewhat, anteriorly. And when there is a lot of muscle spasm it usually straightens the curve. It is an indication of some difficulty in the lumbar spinal area, and there was moderate lumbar muscle spasm more marked on the right.

Q. What does that indicate, Doctor? A. That there is an

attempt of nature to prevent excessive movement, to limit the motion of the lumbar spine; forward bending was accomplished fifty-five degrees.

[47] Q. What's the normal, Doctor? A. Well, usually around ninety degrees.

Q. So that? A. There was a definite limitation of the forward bending. He could not bend completely normally. Then the right straight leg raising test was fifty-five degrees from the horizontal.

Q. Did you also make the same test on the left? A. Yes.

Q. What was it on the left? A. The left was sixty-five degrees.

Q. What is this an indication of, if anything? A. When there is a limitation of the straight leg raising it usually indicates muscle spasm, which is usually secondary to pressure against a nerve and excessive elevation would stretch the nerve against this particular pressure and produce pain, so that the spasm of the muscles are increased, which prevents the forward further elevation of the leg above a certain minimum. Then the Lassague sign was positive on the right.

Q. What's the Lassague sign? A. When the patient is flat on his back and the lower extremity is lifted to the point of the beginning of pain so that the patient cannot lift his leg any further beyond which pain is produced, of course at that particular level the foot [48] is flexed inward which consists of excessive stretching of the muscle and the nerve and if that produces pain running down the leg it indicates that this excessive stretching caused a stretching of the nerve against whatever is pressing against it, and produces pain running down the extremity. It was positive on the left and negative on the right. The knee and ankle jerks, that is the reflexes, were normal on both sides. The right leg measured one soro-meter less than the left in diameter. There were no sensory changes at that particular time and

there was mild tenderness on pressure of the interspace between the fourth and fifth lumbar vertebrae.

Q. What is that an indication of, Doctor? A. That there is something sensitive there, the nerve root leaves at that particular level just to the right of the midline and pressure against that area will increase pressure against the nerve root. If there is something pressing the nerve root at the same time, ordinarily you can press this area, and if there is nothing pressing abnormally in the nerve root the nerve root moves without difficulty. If there is something in front of it and you press the muscle behind it then it produces the pain.

Q. Did you have any other findings, Doctor? A. Well, the patient walked very carefully and slowly so that I couldn't detect a limp at that particular time. But his gait was sort of a very careful one, as through he were [49] afraid to slip or he would make a misstep.

Q. Did you take any personal complaints from the patient? A. Yes.

Q. What did he tell you? A. He stated that he had pain in the lumbar region, that is the lower back, and the pain radiated to the right buttock, and to the right leg. When he sat or when he lay down he had pain in his back, and his leg, but when he walked about he felt somewhat better although, as he told me, the pain was never completely gone even though he walked, but moving around helped relieve some of the pain in the back.

Q. Did you take any X-rays, Doctor? A. No, I did not.

Q. As a result of that examination, did you make a diagnosis? A. Clinically he showed evidence of a probable disc, a herniated disc at the L-4, L-5 interspace at the right.

Q. After you made that clinical diagnosis did you then check, at my request, the records in the State Insurance Fund? A. Yes, I did.

Q. What did you find, Doctor? A. Well, the Committee on Evaluation of Spinal Injuries of the Fondo, which is composed of the neuro-surgeon and an orthopedist, a radiologist and a doctor in physical medicine, and also a representative of the Fondo, they sort of compose a neutral committee and they examined the patient and the [50] myelogram and they found that a review of the myelogram revealed evidence of a herniated nucleus pulposus at this L-5, L-4 interspace at that particular time. Although the patient did have a herniated disc clinically they stated it didn't warrant surgery because he did not have sufficiently severe pain for surgery and they suggested he be referred for a disability rating.

Q. What's a herniated disc, Doctor? A. Well, a herniated disc is a prolapse or an extrusion of a portion of the disc material out of its normal situation, that is, between two vertebrae.

Q. I show you this diagram, Doctor, and ask you if you can identify this? Can you tell us what it is? And, what it represents? A. This is one of the vertebrae and this is the spinal cord, and this is the relative nerve roots, and here is the disc. Actually—

Q. I want to ask you, Doctor, would this in any way make it easier for you to explain to the Court the processes involved?

The Court: What's that chart, first?

Mr. Nachman: This chart was prepared, but it does not say who prepared it.

Trauma: Volume 1, Number 5, (See "Planning the neck Injury Case" by Leo Gelfand M.D., LL.B. and Marshall Houts LL.B.)

[51] A diagrammatic representation of the cross section of a cervical interspace illustrating the mechanism of the protrusion of the intervertebral disc and compression of the nerve root.

A. I think it is perhaps very graphic and perhaps the Judge would want to use it.

Mr. Nachman: Do you have any objection to that?

The Court: Do you need time to examine that, Mr. Rout? We may have a recess.

Mr. Rout: No, thanks, Your Honor. I think we will be able to pass on it in a moment. No objection.

Mr. Nachman: I offer it in evidence, Your Honor.

Mr. Rout: No objection.

Mr. Nachman: It is admitted and orderegi marked Exhibit 1 for libelant.

THE CHART PREVIOSLY IDENTIFIED WAS THEREUPON ADMITTED IN EVIDENCE AND MARKED EXHIBIT 1 FOR LIBELANT.

By Mr. Nachman:

Q. This isn't a lumbar disc, is it? A. No, it is a cervical disc.

Q. Would that make any difference in explaining this? A. The only difference it might make is the fact that this space instead of having a spinal cord is really in the lumbar area, has a lot of these nerves, but it does not make [52] any difference because the question is the herniation, laterally against the nerves, so this is all we have to worry about, and this is very well done.

Q. So in the lumbar area there is no spinal cord? A. No; there is one other thing: I think this is really this way, cut like that, so one is looking down on it, because here's the back. This would be the front. It would be like this, looking down on it.

Q. You are looking down from the top? A. Yes.

The Court: You are looking into a well?

The Witness: Yes, sir.

By Mr. Nachman:

Q. What happens when one has a herniated disc, Doctor? A. Well, this back line, this thick black line, is what we call the annulus fibrosus, a fibrous elastic band, the same thick-

ness of the disc at each interspace and it holds the inner portion of the disc known as the nucleus pulposus. This material is only semi-solid so that it is compressible to some extent. As long as this are, the annulus or the ring remains strong this disc will never collapse, it will never bulge out. But if any portion of this ring becomes weak the pressure of the body will compress the disc and naturally the disc, which is semi-sold, will tend to flow where the area is weakest. So that if this portion is weaker the pressure [53] of the body against this particular semi-sold thing will push it toward the weak area in this ring. This should be represented a little thinner than that. It is indicating a weakening in this particular area. If this weakening is sufficient so that the semi-solid material will push, say, enough to press against the nerve, then it will compress the nerve. As you see, this nerve is much thicker here, and thinner there, because it is compressed. And as long as the pressure is maintained against this nerve the patient will feel the pain running along the distribution of the nerve.

This nerve goes to the leg. Of course the patient will feel the pain running down the leg. Now, this, because they are semi-solid, sometimes will change in the amount of pressure, or the amount of pressure against the nerve will change so that certain positions which the patient may assume, may relieve the pressure against the nerve temporarily, because if the patient seems to have an individual knowledge as to just what position is best for him, each patient seems to have this individual knowledge. No doctor can say you will feel better with your leg up or down or on the side. Each patient knows which position is best for him. So that these particular cases may become better or worse during the day time or the nighttime or even weeks, depending on where this little budge is in relation to the nerve itself. As long as the nerve is free it is perfectly all right to have a bad disc, because it [54] isn't pressing against

the nerve particularly. But no sooner does it compress against the nerve then the patient has incapacitating pain. Not always, but usually, if the pressure is mild the patient may be able to stand the pain and to do certain activities. If it is severe, then of course they cannot do any hard work.

Q. If I understand you correctly, a herniated disc in and of itself is not necessarily disabling? A. No, it depends on where it herniates.

Q. And if it presses the nerve the disability is there dependent solely upon the amount of the pressure on the nerve? A. The amount of the pressure on the nerve.

Q. Does one necessarily have to sustain a herniated disc with a single trauma? A. No, not necessarily.

Q. To start from the beginning, are herniated discs the result of trauma? A. Yes.

Q. When you say they are not necessarily the result of a single trauma, would you explain that, Doctor? How could it come with multiple trauma? A. This ligament is about this thick, about this thick, I would say. Now, if sometimes a patients, let's say lifts something or slips and hurts himself, like in this particular patient who sat down like that, after he sat down there was a [55] great deal of pressure exerted on this particular area and the ligament here may tear some of those fibers. Now, when these fibers are torn they are healed in time, sometimes completely, sometimes incompletely, but if they are healed completely they are healed with fibrous tissues and lose their elastic fibers because the elastic fibers do not regenerate, they are healed with this fibrous tissue, more brittle, relatively speaking than the other, so that even though the symptoms may disappear there remains a relatively weak spot as compared to the rest of the annular ring.

Q. And if it is a relatively weak spot, is the back at that area, or is that particular disc more susceptible to being injured? A. If pressure is exerted in this particular area

again, this is the area that may rupture and usually does.

Q. Doctor, what effect do generative changes of the spinal column have, the whole spinal structure, upon your ability to withstand pressure? A. I didn't get the question, the meaning.

Q. Do advanced osteo-arthritic changes of the spinal column play any part in the spine on a disc to withstand trauma? A. The older a person gets the less likely he is to —that's very hard to say because discs can occur in young people too, depending on the amount of trauma that's there. But it may be that the older a patient gets that this particular thing [56] may become less elastic. But these people usually do not go through the exertions that a young person does.

Q. Doctor, when this patient saw you in 1960, did he tell you he had suffered an injury in 1951, to the back? A. He said he had a back injury, yes.

Q. Did he also tell you he had a back injury in 1959? A. Yes, he didn't say a back injury. He said his foot sort of slipped or twisted, and he never hurt his back.

Q. Would you sit down, Doctor? When that nerve is pinched at that point why does the patient feel pain in his leg and not in his back? A. Well, as a matter of fact, they feel pain in their back when the ligament is injured. They can feel pain in their back or they may have a muscle strain without injury, when they have pain in their back. Those are the ones that we call a muscle strain, that usually heal up completely. But as soon as this nerve is pinched, the reason they feel pain in the leg it is because it is like an electric current being applied to a wire, and the electric current which is the pressure applied to the disc, the nerve, which goes onto the leg, the pain will be felt where the nerve runs. Does that answer your question?

Q. Yes. Doctor, I want you to assume that in 1951 Mr. Federico Marin Gutiérrez sustained an accident while work-

ing for an employer in Ponce, as a result of which he was under [57] treatment for a period of approximately six months, that at that time he felt — he testified he felt pain in his back and that he felt pain for some time after he returned to work in his back but that gradually the pain went away and that in 1956, on October 21st, while attempting to receive a sling load of merchandise from a vessel, he slipped on grains of substance, either corn or rice or beans, on the dock, and he fell seated and over to the right, that he was unable to get up unassisted and thereafter he was helped to the minor surgeon and the next day he reported to the hospital. That he was thereafter hospitalized during the time he was given massages, pills, heat treatments, and hot water bottles. And after that he was an ambulatory patient and thereafter in about a little more than four or five weeks he was discharged to work. But when he went back to work he testified that he continued to have pain not only in the back but radiating down the right side.

I want you to assume further that when he was examined for this injury in 1946 it was found that he had advanced osteo-arthritic changes of the spinal column of long standing, but that there was no evidence on the X-rays of any osseus pathology as a result of this accident, that he went back to work and in 1958 he stepped in a hole and was sent by his employer to the State Insurance Fund and was told to go back to work and went back to work on next day and complained of no injury at that time. But he continued to work [58] throughout 1957 and 1958 until June, 1959, when he testified his leg gave way upon him and he fell, but did not fall to the ground, and held on to a sling. That thereafter he was treated again by the State Insurance Fund, and that the pain in the right leg continued to get worse but it had continued throughout all this period of time. That in 1959 he was examined by the Back Committee as you have read from the State Fund records and they came

to the conclusion after myelographic studies that he had a herniated nucleus pulposus at L-4, L-5 on the right. And thereafter he was examined by you in February, 1960, and you made a clinical diagnosis of nerve root injury as a result of herniation of the intervertebral space at the L-4, L-5 on the right.

Doctor, can you state with reasonable medical certainty whether or not the accident that he described to you as occurring in 1956 was a proximate cause of his complaints and his injuries for which he had been treated in 1956, 1957, and in 1959? A. I think that was the contributing factor to his present condition.

Q. Doctor, can you state what relationship the 1951 accident played in this back that you have examined? A. Well, it is very difficult to state because he had recovered for three or four years, I understand and the diagnosis of lumbar sprain was made without any evidence of this pathology [59] at the time, and I had to depend on the examination by the physicians at that particular time. Upon those circumstances there was no evidence he had any disc pathology from the medical reports.

Q. Doctor, assuming he had just a lumbar sprain what would that do to his back with relation to subsequent trauma, if sustained? A. If he had what?

Q. A lumbar sprain in 1951, would it weaken his back in any way so he would be more susceptible to trauma at any other time? A. If he recovered completely there is no reason for it to be a contributing factor.

Q. Then, Doctor, what about the osteo-arthritic changes found in 1956? A. That we see in many patients who never had any trouble with disc.

Q. Can you isolate the 1956 from the 1959 trauma, to say that the man had no disc since he wasn't actually there was no myelogram and you didn't see him in 1959, can you say the 1956 accident wasn't a disc based upon the history

you have received? A. Based upon the history alone I would think it was a disc in 1956.

Q. Yes? A. Yes.

[60] Q. What effect would the 1959 trauma have upon the 1956 accident? A. It would seem that particular trauma which wasn't very severe, would have produced severe symptoms because the previous injury had already weakened the ligament, the annular ligament, sufficiently to allow a new injury to produce severe symptoms.

Q. Doctor, can you state on the basis of your examination of this man, whether or not in your opinion he is disabled? A. I think in his present condition he is disabled.

Q. When you say disabled, just exactly what do you mean, Doctor? A. Well, I don't think he is ever comfortable. I don't think he should do any hard work. In sitting or even in light work he feels this aching pain which is very common in herniated discs.

Q. Now, Doctor, can you state with any reasonable degree of certainty whether this condition you found in February 1960 is permanent? A. If he does nothing about it I think it would be permanent.

Q. Is there anything you recommend you should do about it, Doctor? A. Well, I thought he should submit to surgery because the way he is at this particular time he just can't do any particular type of work and although we cannot guarantee the results of surgery I feel he has much better chance of recovering [61] with surgery than without surgery.

Q. Isn't it true as you testified earlier that some days discs are better and some days they are worse? A. Yes, that's a chronic picture.

Q. Is it possible for him to work at all with this condition? A. Oh, yes. At certain times I think people who have definite ruptured discs, but if the pressure is very mild, learn to prevent excessive pressure in this particular area

and just drag along working. They can work when the pain is not too severe. They may have discomfort but it may not be sufficient or severe enough. It only may prevent them from doing hard work.

Q. But on the basis of your examination and the records of the State Insurance Fund it is your recommendation that he undergo the surgery? A. Yes, I would definitely say so.

Mr. Nachman: Your witness.

The Court: We will take a ten-minute recess.

(A short recess was then taken.)

Cross-Examination

By Mr. Rout:

XQ. Doctor, you stated that herniation only results from trauma, on direct examination, did you not, or did you mean to qualify that? A. Practically always.

[62] XQ. It is possible, however, for it to occur as the result of minor, relatively normal activities in a human being's daily life? A. Well, that's trauma too.

Q. But herniation can result from— A. Not from normal activity.

Q. It can't result from the activities which someone may resort to in the course of his life without him knowing he has been injured? A. What activities are you referring to?

Q. Reaching, stretching, getting out of bed, doing exercises, athletics? A. Where are you referring to?

Q. I am asking whether in the normal activities of human beings whether he can suffer from herniation without any injury which lays him up? A. You have to have an injury to the annulus before you can have a herniated disc.

Q. But I may not be aware of the injury of the annulus. A. It depends on the pain threshold of the patient.

Q. I am asking if it would be possible for him not to be aware of the injuries? A. Is what possible?

Q. Is it possible in certain instances. A. Exactly is what possible?

Q. Is it possible in certain instances for an individual [63] to suffer degeneration or deterioration of the annulus fibrosus without him knowing about it? A. If he does not know he has an annulus fibrosus any back pain may be an injury to the annulus fibrosus but he does not known he has an injury to the annulus fibrosus so he would never think of it being related to this pain in the back that he has.

(The question was read back by the Reporter.)

The Witness: If he has deterioration or degeneration he won't know about it unless he has a disc protrusion.

XQ. The answer is yes, isn't it? A. No, it isn't. If a man has a degeneration or deteriorattion he can even have a ruptured disc and if it does not press against a nerve he won't have nerve pain. If the nucleus does not protrude he won't have any symptoms due to the annulus.

XQ. By degeneration you mean weakening of the annulus? A. Any stretching of the fibers of the annulus. That's what they are for, to stretch in various movements.

XQ. I am talking about stretching beyond that does not return to its normal position. Then the patient would have some pain in his back? A. Then the patient would have some pain.

XQ. Then you are saying it could never occur except with [64] a pain in the back? A. I would say this, that a patient may not remember having the pain in the back at that particular time; the pain may have occurred ten years, two years, before.

XQ. If you assume that in 1951 in the injury of that date that the libelant in this case had pain in his left leg would that change the conclusion that you came to on direct testimony? A. What conclusion are you referring to?

XQ. The conclusion between the relationship of the 1956

injury and his present condition? A. Will you repeat your question, please?

(The question was read back by the reporter.)

A. That the 1956 injury was the cause of this condition?

XQ. Is related to this present condition. A. I would say if he had pain in his left leg in 1951 then I think the injuries in 1956 had nothing to do with one in 1951. It may have been related to another level. He may have had a herniated disc in a different place, which healed up completely, so this picture is a completely different picture. It would more than reaffirm my conclusion that this 1956 injury based on what you told me is the actual cause of this man's present condition.

XQ. If you assume further that there was a diagnosis of sciatica in 1951 would that change your opinion? A. Which side?

[66] XQ. On the left side. A. It would definitely reaffirm my opinion that this injury in 1956 on the right side was definitely not related to the injury on the right side.

XQ. Doctor, if we further assume in addition to sciatica on the left side—

The Court: Excuse me just a minute. We will take a short recess of ten minutes.

(A short recess was then taken.)

Mr. Rout: We have an outstanding question, Madam Reporter.

(The question was read back by the Reporter.)

By Mr. Rout:

XQ. If we further assume sciatica in the left side and pain in the left side, that there was no pain in the right leg as the result of the October 21, 1956 injury, which is involved here, would your conclusions as stated on direct testimony have changed? A. My conclusions would not have changed, but would have been even strengthened with

this new evidence which I didn't know existed. I didn't know he had pain in the left side in 1951 and if he did, in my opinion it would show that either the disc, if he had a herniated disc at that time, may have been at a different level or healed up completely, because usually if they have an injury which results in sciatica let's say on the left side, if that condition existed all these years, that a [66] subsequent injury practically always reproduces the original sciatica on the same side so that in that instance it would seem to me that therefore the man's injury was that in 1951 he had definitely completely recovered and that this was a new injury which resulted in pain on the right side.

XQ. Assuming further that in connection with this October 1956 injury he suffered no pain in the leg but merely pain in the inguinal area, does that change your conclusion on direct testimony? A. It does not, because many times spasms in the back and buttock muscles will cause pain in both inguinal areas because the muscles are attached to the back.

XQ. If it were a protruding disc, Doctor, there being pain in the right leg. A. It depends. The disc may be protruding but not enough to depress the root and as the hours go on, first, that hit on the buttocks, and it may take two or three days before that liquid mucous would force itself through the opening. It may taken even longer.

XQ. Wouldn't these same symptoms be a diagnosis for sprain? A. Which same symptoms?

XQ. In 1956 with a pain on the right side, with no pain in the right leg? A. I think one shouldn't jump to a hasty diagnosis until [67] he observes the patient for a short time. I don't know what happened in 1951; I didn't examine him at that time, but I would say that the physician who makes a diagnosis of just a lumbar sprain on merely

observing the patient at the time of the injury is laying himself open for criticism.

XQ. Would you read the question back to the witness, please?

(The question was read back by the Reporter.)

A. Is that the way you asked the question? Do you mean the right lumber region or the inguinal region?

XQ. The inguinal region. A. Without any pain in the back?

XQ. Without pain in the leg; pain in the lumbar-sacro region. No pain in the leg, is the question. A. I am confused. Please repeat it.

XQ. Let me reword the question: If the information that you had before you as the result of the October 21st, 1956, injury was that he had a pain in the lumbar-sacro and in the inguinal region in the right side, wouldn't a lumbar sprain be a proper diagnosis? A. It would depend on what I found on examination of the patient.

XQ. It isn't conclusive, it it? A. It would depend. If I found the limitation of straight leg raising or positive Lassague on the history alone, it is impossible to make a definite diagnosis merely on a pain in the [68] back in the inguinal region. It has to coincide with the clinical diagnosis.

XQ. You can't diagnose a herniated disc either on that basis, could you? A. What basis?

XQ. The findings of the 1956 injury. A. You are referring to the history of the thing but those are statements, those aren't findings. What I mean, the findings that the physician found on physical examination. All you asked me, if a patient has a pain in the right lumbar region, and pain in the right inguinal region, can you make the diagnosis of a disc? He might have an appendicitis with those symptoms. I would be very likely to have that as a diagnosis I should rule out.

XQ. What symptoms or what clinical history or what factors or findings would you take into consideration in stating your conclusions on direct examination? A. On direct examination? I read them a little while ago. Do you want me to repeat those?

XQ. Yes. A. He had a loss of his lumbar curve, which, as I said, indicated muscle spasm.

XQ. I am not talking about your particular examination in 1960. I am talking about other factors you had before you for the 1956 injury alone, upon which you based your [69] conclusion. A. The very fact that he gave a history of slipping, falling on his buttocks, having pain in his back and his buttocks, and later on—I don't know how much later—he started having a radiation of pain along his right leg. That is a history which is suggestive of root pressure probably due to a herniated disc.

XQ. Can you state for us whether he suffered a herniated disc for the first time in his 1959 fall on that basis, the basis of your examination? A. Will you state the question again, please?

(The question was read back by the Reporter.)

A. On the basis of my examination?

XQ. You can't state that, can you, Doctor, on the basis of your examination whether he suffered a herniated disc?

Mr. Nachman: Objection. He hasn't answered the first question.

The Court: Let him answer.

A. On the basis of my examination in February 1959?

Mr. Nachman: 1960.

The Witness: 1960. I am sorry. The only thing I could decide was that the man had a herniated disc between L-4 and L-5 based on his history which he gave me of the accident which occurred in 1956, where he had continuous discomfort in his right leg, which became worse and better and then worse, and better. I concluded that he had a

herniated disc in 1956, whose [70] symptoms was aggravated by this twisting motion when he slipped in 1959.

XQ. Did he tell you about his injury in 1958? A. I am not certain. I didn't include it in my findings.

XQ. He told you he suffered pain in his right leg after his 1956 injury. You mentioned that several times? A. Yes.

XQ. Is that a critical symptom, Doctor, frankly, in your diagnosis of 1960? A. A critical symptom as to making up my mind whether he had a disc? Yes, I would say so. It is an important factor.

XQ. Did he state, Doctor, how long it took him to recover from his 1951 injury, in your examination? A. He said several months.

XQ. Did he say how long it took him to recover from 1956 injury? A. He said he had relatively marked pain for about a month or a month and a half, which gradually became a little better, but that the pain had never completely left him, although he was able to stand the discomfort.

XQ. Did he tell you he had a complete examination in 1958 for the purposes of employment? A. I didn't ask that. There was no reason for my asking that.

XQ. He didn't report it? A. No.

[71] XQ. If you assume further that in 1958 he had undergone a thorough general physical examination and had been certified to be in good health and able to perform certain duties as a carpenter, would that have changed your opinion in 1960 upon your examination of the libelant? A. I would have to know who did the examination and the type of examination that was done and no matter who did, if I have stated if his disc protruded somewhat where he didn't have very marked symptoms I can see where a general examination which wouldn't include a very careful neurological examination might certify him for that type

of work and still wouldn't negate the fact that he still might have had some mild symptoms secondary to a herniated disc which was present but not pressing markedly against the nerve root at the time.

Mr. Rout: No further questions.

Redirect Examination

By Mr. Nachman:

Q. Doctor, you stated that if we assumed that after the 1951 accident that there was sciatica on the left it would strengthen your conclusion that the 1951 accident played no part in his present back symptomotology? Would you explain why? A. As I have stated before, if there is an injury to the annulus fibrosus, it usually heals with fibrous tissue, and not with elastic tissue. Where this might be strong enough in certain instances to prevent the disc from herniating at that place against the nerve root any more, it always remains [72] a relatively weak spot. Now a patient heals the annulus fibrosus and then as we say he is cured of his disc. The fall that he had in 1956 might have been of such a nature that the force of the impact, the greatest amount of force was concentrated not on the area, and ruptured the annulus at another place, which was a sufficient degree greater than the first one so that the nucleus could go through this weak point and wouldn't affect the other area, and that's one of the reasons I feel that the 1956 injury was a completely separate thing because usually if the apex of the force—when the man forcibly sits down and a force is shot up as it is at the same disc level as there is a weak area in that particular annulus, the annulus which was injured before practically always ruptures in the same place. Therefore it would stand to reason from a scientific viewpoint that you should have a repeat on his pain but you have just the opposite, the im-

pact must have been at a different level because the pain was on the opposite side.

Q. Can you get sciatica from herniation of the disc and nerve root pressure at different levels? A. Yes.

Q. Why is that, Doctor? A. Because there are five lumbar roots and about five or six or seven nerve roots further down combined to form the sciatic nerve. So pressure at any of these roots no matter what level will cause pain along the leg. It can be [73] L-3, L-4, L-2, L-3, L-4, L-5—usually it will cause pain behind the leg. If it is higher it may cause pain at the thermal, but usually the lower areas will cause pain along the sciatic nerve. There are at least four or five different levels which can cause pain along the sciatic nerve.

JOSE DEL PRADO

a witness called by and on behalf of the respondent, upon being examined testified as follows:

[74] *Direct Examination*

By Mr. Rout:

Q. Please state your name? A. Jose del Prado.

Q. Your address? A. Ponce, Puerto Rico.

Q. Your occupation, doctor? A. I am a physician.

Q. Do you know the libelant in this case, Mr. Marin Gutierrez? A. Yes, I know him.

Q. Can you point to him, please?

Mr. Nachman: I concede he knows him.

A. There he is.

Q. Did you interview the libelant on or around October 21, 1956? A. This patient came to the Fondo in Ponce in 1956, and the only intervention I had with him was that I procured one X-Ray of the spinal cord.

Q. May I have the 1956 State Insurance Fund file? I would like to show the witness respondent's Exhibit 4

for Identification, and ask him if he can identify it? A. Yes, I can.

Q. Would you tell us what that is, Doctor?

The Court: That Exhibit was admitted.

[75] Q. Would you tell us what Exhibit 4 is, please, Doctor? A. This document is an order of the State Insurance Fund for an X-Ray.

Q. Did you sign that order? A. Yes, I did.

Q. At the time you ordered that examination, did the libelant complain of pain in his right leg?

Mr. Nachman: I object.

The Court: The witness has stated that the only intervention he had with the libelant was to procure an X-Ray of the spinal cord.

Q. Did you prior to your ordering this X-Ray—did you interview the libelant, Doctor? A. Yes. He came over to my desk with this order which is typed by the secretary, and then we have to read what the secretary types and then, it is in accordance with what the patient says, we continue with the patient. This is the history given by the patient to the secretary. Then the patient comes to the physician's desk with this sheet and we have to check to see whether what the secretary wrote is the same thing that the patient says. Then if we are in agreement, the prescriptions are made for laboratory analyses, etc.

Q. Did you, Doctor, check with the libelant? A. Yes, sir.

Q. And what was it that you verified on that document? [76] A. Well, he alleged that upon attempting to hold a draft he slipped and fell sitting down on the pavement, feeling pain in his buttocks, his waist and the inguinal region of both sides. That's all.

Q. He said nothing about pain in his right leg? A. No. At that time, no.

Q. Doctor, did you ever examine libelant on behalf of

a prospective employer? A. Yes, in the last days of December 1957 I examined him to get a job at Brown-Root, and we had to do a careful examination of the patient because this is the regulation of the Brown-Root Company, and if the laborer is completely O.K. we give a certification of good health and send him over to Brown and Root.

Q. Prior to that examination for the purposes of employment, had you ever examined libelant? Any other time? A. Prior to what?

Q. Prior to that? A. In 1956, when he went to the State Insurance Fund.

Q. In connection with your examination in December 1957, did he complain of any pains? A. No.

Q. In the back? A. No.

Q. In the leg? [77] A. No.

Q. Did you give him any tests to determine whether he would have pain in those areas? A. Yes, we have to do that.

Q. Would you tell us what examination you conducted? A. It is just to bend the body. We test the reflexes, the blood pressure, the heart, lungs, the sight.

Q. Did you conduct a knee jerk examination? A. The patellar reflexes, yes, we have to do that.

Q. What was the result of that examination, Doctor? A. It was normal.

Q. Did you make any recommendation to Brown-Root? A. We gave the recommendation that he was in good health at that time.

Mr. Rout: No further questions.

Cross Examination

By Mr. Nachman:

XQ. Doctor, did you get a subpoena to testify here today? A. Yes, sir.

XQ. Do you have that subpoena with you? A. Yes, sir.

XQ. May I see it please, Doctor? Doctor, this subpoena was given to you by somebody from the firm of Hartzell, Fernandez and Novas? A. It was delivered to me at my office.

[78] XQ. And that's in Ponce? Who delivered it, Doctor? A. Mr. Bartolomei.

XQ. And this subpoena asked you to bring all records, correspondence and other documents pertaining to the injury sustained to Mr. Marin Gutierrez in March, 1958? A. Yes, I did it.

XQ. I see that you did. Did they ask you to bring the reports that you performed in December 1957? A. No, they didn't.

XQ. Did you take out a copy of that report to refresh your recollection before testifying? A. No, this is a blank that Brown and Root sent with the laborer and we have to send it again.

The Court: You don't keep any duplicates of that? A. No, just a little card that we write "approved" or "rejected."

XQ. Then do you have any independent recollection whatsoever of examining him in December 1957, other than the fact that his name appears on a card and you approved him? A. We have a card.

XQ. Do you remember what you did on that particular examination, or are you testifying that was the routine of what you did? A. This was the routine physical examination.

XQ. But do you or not have any independent recollection [79] of that examination? A. No, this is a general rutinary examination.

XQ. And you don't even have a copy of that examination in your office? A. No.

XQ. And you have no record of the questions you asked

him, or the answers he gave you in December 1957? A. No, there is no record of that.

XQ. And before you came here today, Doctor, did you refresh your recollection with any records you had as to the time you saw this patient in October 1956? A. I don't understand the question.

XQ. Well, Doctor, when you were subpoenaed you were subpoenaed to testify only as to the March 1958 occurrence upon which you were asked nothing on direct examination, is that right? So when you came to court this morning, that's all you knew about, that you were going to testify as to this examination of 1958, and yet on direct examination you were asked nothing of the March 1958 occurrence, is that right? What was the first time you knew you had anything to do with this patient on October 1956? A. Because the attorney showed me the record of the State Fund which is signed by me.

XQ. Now, at the time of that order, which I think is respondent's Exhibit 4, at the top of that order for X-Ray report, [80] is a history, is that correct? A. Yes.

XQ. You didn't take that history yourself, on that day, did you? A. No.

XQ. As a matter of fact, you didn't order that X-Ray until 7 days after the accident, isn't that so? A. I don't remember the day exactly.

XQ. Or the day after the accident. I am sorry, Doctor. This history was taken by some other person on the day of the accident, is that correct? A. That's correct.

XQ. And then the secretary typed up that order, and the man was at your desk as I understand it, and you read him this, is that correct? A. I did what? Yes, I read it.

XQ. And you asked him if he was in accordance with what was read? A. Yes, sir.

XQ. You didn't take an independent history of how the

accident occurred, and what pains he had, in what part of his body? A. Well, we have to do it.

XQ. Somebody had to do it, but did you do it? A. I asked him, yes.

[81] XQ. What did you do, besides that? A. I asked if it was correct, the history that he gave to the nurse.

XQ. Did you ask him anything else besides whether or not this was correct? A. Yes. We have to ask if they have pain in any other place, or if he can . . .

The Court: But it isn't what you have to do, but what you did.

A. I don't remember this specific case.

XQ. Doctor, do you have any specialty? A. No, I am in general practice.

XQ. Then you came here specifically, then, not to testify as an expert but as a fact witness? A. No, I came for the case of 1958.

XQ. And that wall all they subpoenaed you for? A. Yes.

Mr. Nachman: No further questions.

Redirect Examination

By Mr. Rout:

Q. Did you bring certain documents with you? A. Yes.

Mr. Rout: I would like to have this medical report marked for identification.

MEDICAL REPORT OF MARCH 26, 1958, WAS MARKED IDENTIFICATION 7 FOR RESPONDENT.

[82] Q. Doctor, would you tell me whether this document purports to bear a signature? A. This is my signature. This other one, you mean?

Q. This signature? A. This is mine.

Mr. Rout: I would like to offer the medical report of March 26, 1958, as part of respondent's evidence.

Mr. Nachman: For what purpose?

Mr. Rout: To establish the results of a medical exami-

nation conducted by Dr. del Prado in connection with libelant's injury of 1958 to his back.

Mr. Nachman: The libelant said he was sent by somebody else, that he did not complain and was dismissed, and I object to its admission to prove that he had an injury. I admit that a physical examination was conducted on that date, and it was found negative as the libelant testified.

Mr. Rout: I may have used the word "injury" improperly. However, I would like to submit that.

The Court: What do you intend to prove with this?

Mr. Rout: Through my medical expert witness, I intend to show that any subsequent injury to the 1956 injury or any complaint of any kind might have some bearing on his present condition, and on the other hand the fact that he had a clean bill of health, if that's what this document says, might have some bearing.

The Court: He said he didn't suffer any injury. He [83] testified as to ~~that, and~~ what does the report say? That he did not suffer anything.

Mr. Nachman: "No hay historia de trauma".

Mr. Rout: This man suffered injury, and if we can sufficiently establish that he was in perfect health in 1957, which resulted in his zealous employer sending him to the Fondo, finding that he was in good condition, then, and would be right now except for the July injury and everything that Dr. Rifkinson testified to might have resulted from 1959 alone.

The Court: Dr. Rifkinson testified that all he has now was the result of the 1956 injury, and he examined the libelant in 1960.

Mr. Rout: But an intervening report by a physician, saying that he had nothing . . .

The Court: That he said he had nothing.

Mr. Rout: Seems to be of some relevance here.

The Court: I am going to permit this. He complained of pain.

Mr. Nachman: It says he complained of pain.

The Court: There was evidence of ganglia, that's Exhibit 7 for respondent.

MEDICAL REPORT OF MARCH 1958 WAS ADMITTED IN EVIDENCE AND MARKED EXHIBIT 7 FOR RESPONDENT.

Mr. Rout: I have no further questions, Your Honor.

[84] *Recross Examination*

By Mr. Nachman:

XQ. Did you take the history of this case in March of 1958, Doctor? A. Yes.

XQ. And did you make the examination? A. Yes; I did.

XQ. I refer you to the third paragraph, Doctor. Will you tell us what it says there, in English? A. On examination in the lumbar region there is no external evidence of trauma, nor history of trauma.

XQ. What does that mean, Doctor? A. That on that occasion he received no injury in the lumbar region.

Mr. Nachman: I have no further questions, Doctor.

[85] FELIX A. ROMAN

a witness called by and on behalf of the libelant, was examined and testified as follows:

Direct Examination

By Mr. Nachman:

Q. Please state your full name? A. Felix Roman.

Q. Where do you live? A. At the Ponce Playa.

Q. What is your occupation? A. I work at the piers.

Q. Do you know the libelant, Federico Marin Gutierrez? A. Yes, I do.

Q. How long have you known him? A. About 20 years.

Q. Did you see an accident that he sustained? A. Yes, sir.

[86] Q. Were you working on that day? A. Yes, sir.

Q. For whom were you working on that day? A. for the Waterman Dock.

Q. And where were you working? A. I was working on the apron, at hatch No. 1.

Q. Do you remember when the accident occurred? A. I am not exactly certain, but I remember it was around 1957.

Q. And where was the libelant working when the accident occurred? A. He was at the apron, contiguous to mine, at No. 2.

Q. And what were you discharging from hold No. 1? A. My hatch was unloading wood.

Q. Do you know what was being discharged from hatch No. 2? A. General cargo.

Q. In boxes, or in bags? A. In bags.

Q. And can you tell me, do you recall what time the accident occurred? A. Between quarter after 3:00, and 3:30.

Q. In the afternoon? A. Yes, sir.

Q. And can you tell us what you saw? [87] A. I saw when Federico fell to the floor.

Q. What, exactly, did you see? Did you just see him fall? A. When he fell, and when I went to try to help him, one of my fellow workers went and lifted him up.

Q. Was there anything on the pier? A. Yes, there was a lot of rice and beans scattered around.

Q. Do you know where that came from? A. Yes, from the drafts.

Q. How did it come from the drafts? A. Sometimes there would be broken bags.

[101] CARMELO FRATICELLI

a witness called by and on behalf on the libelant, was examined and testified as follows:

[102] *Direct Examination*

By Mr. Nachman:

Q. What is your name? A. Carmelo Fraticelli.

[103] Q. Mr. Fraticelli, do you remember when the accident occurred? A. Yes, sir.

Q. When did it happen? A. In 1956.

Q. Do you remember the month? A. March, I mean October.

Q. And do you remember the ship? A. It was a Waterman boat. I don't remember the name.

Q. Were you working aboard or ashore? A. Ashore.

Q. What hatch were you working in? A. No. 2.

Q. Forward or aft? A. In No. 2 forward.

Q. Who was your companion? A. Federico Marin.

Q. Did he have an accident on that day? [104] A. Yes, sir.

Q. At what time? A. between 3:00 and 3:30 in the afternoon.

Q. And did you see the accident? A. Yes, sir.

Q. What happened? A. We were unloading general cargo. The bags were broken and grains of rice and beans and feed would fall on the floor. And we were putting the load on carts. When Marin Gutierrez and I went to pull on the cart he slipped and fell on the floor.

Q. What caused him to slip? A. Because of the grains that were on the floor. The waste from the bags.

* * * *

[105] Mr. Nachman: I don't know the basis for the objection.

The Court: I believe the objection is well taken, and the question and answer are ordered stricken. Now, the other

answers he gave are questions of fact that the grains had spilled, that they could not sweep it, that the company had to take care of it.

Q. When did you start work on this day, Mr. Fraticelli? A. At 7:00 in the morning.

Q. And when did you start to discharge bags of merchandise? A. Beans were in the drafts from the time we started to discharge cargo.

Q. And when, for the first time, did you notice that there were broken sacks? A. From 8:00 in the morning on.

Q. And, Mr. Fraticelli, did the condition continue all day, or did anybody clean up the dock? A. That went on the whole day.

Q. And these grains that came on the dock, did they fall from the draft while they were still attached to the ship? A. Yes, sir.

Mr. Rout: I move that the last question and answer be stricken. It is leading.

The Court: It is ordered stricken.

Q. Did you see the grains fall on the dock, as you were handling the cargo on the dock?

[106] Mr. Rout: Objection, Your Honor.

The Interpreter: He is just saying it different, that's all.

Mr. Nachman: I will withdraw the question.

Q. Where did you see the grains come from? The grains that fell on the dock? A. From the draft.

Q. Where was the draft when you saw the grains falling down? A. It was coming from aboard the ship.

* * *

[110] JOSE ANTONIO IGUINA REYES

a witness called by and on behalf of the respondent, after having been first duly sworn was examined and testified as follows:

Direct Examination

By Mr. Rout:,

Q. Please state your full name? A. Jose Antonio Iguina Reyes.

Q. Your address? A. Ponce, Puerto Rico.

Q. What is your occupation? A. Physician and orthopedic surgeon.

Q. Would you stipulate as to the qualifications?

Mr. Nachman: I would stipulate that he is an orthopedic sugeon, but you are not calling him as an expert.

The Court: You stipulate that he is qualified?

Mr. Nachman: As I understood, he is not being called as an expert, but just as a witness.

Mr. Rout: I think they are synonymous, so long as you stipulate that he is to be called as an orthopedic surgeon.

Mr. Nachman: It is quite different—if he is a fact witness. There is nothing to stipulate. He admits he is an orthopedic surgeon.

Mr. Rout: In the event that some of the man's testimony develops to require statements of expert testimony, will [111] you stipulate that he is an expert?

Mr. Nachman: I don't know if you can specify that he can testify as an expert in this case.

The Court: Then you don't concede—

Mr. Nachman: I concede his qualifications, but not his being able to testify as an expert.

The Court: Even on a hypothetical question?

Mr. Nachman: He hasn't seen this patient since October 1956, to my knowledge.

The Court: But if a hypothetical question, based on the evidence of record is put to him, as an expert, you concede that he could answer it?

Mr. Nachman: Sure, he could answer it.

The Court: All right.

Q. Doctor, do you know the libelant in this case, Federico Marin Gutierrez? A. Yes, I do.

Q. Will you point to him, please? A. That gentleman there.

Q. Did you examine Federico Marin Gutierrez as a result of an accident which he suffered on October 21, 1956? A. Yes, I did.

Q. Please state in detail the examination that you conducted? A. I did a routine orthopedic examination on 21 October 1956, going all through the movements of the trunk, the [112] reflexes, sensory and percussion, and palpation.

Mr. Nachman: what was the last? A. Palpation.

Q. Were X-Rays taken of the libelant at that time? A. Yes, sir.

Q. What were the results of the X-Rays? A. The results of the X-Rays were negative for fracture or dislocation. X-Rays were taken of the sacro-lumbar spine and they were negative for fracture or dislocation, and they show that the patient had a moderate amount of osteo-arthritic changes of the 5th lumbar vertebra and the sacrum.

The Court: That was arthritis of—? A. Osteo-arthritis of the 5th lumbar vertebra.

Q. In your opinion, what injury did the libelant suffer as a result of this accident of October 21, 1956? A. The libelant suffered a sacro-lumbar sprain that produced a low back pain, due to a fall, sitting hard on his buttocks. He slipped and fell on his buttocks. That's what I call, sitting hard.

Q. At the time of your examination of the libelant, what was your opinion with respect to his recovery from his October 21, 1956, accident? A. Well, he was completely recovered from his accident of October 21, 1956.

Mr. Nachman: I object, and I ask that the answer be [113] stricken.

The Court: Yes, the answer is not responsive, because if he examined him on October 21, 1956, and the accident was on October 21, 1956, he could not have been completely recovered. What you asked is about his recovery after he examined him. Please repeat the question.

(The question was read back by the Reporter.)

Q. Did you understand that question? A. Yes, I did. Could I elaborate a little?

The Court: You may.

A. I examined the patient again on November 26, 1956.

The Court: Oh, that's different.

A. And then on that date, November 26, 1956, I found that he was completely recovered from his injuries of October 21, 1956.

Q. In your opinion, Doctor, was Beckett left with any permanent disability as a result of the accident of 1956? A. No, sir.

Q. What was the conclusion which you came to on behalf of the State Insurance Fund as a result of your examination? A. That he was completely recovered, and returned to his condition prior to the accident of 21st of October 1956, and that he should be discharged without any incapacity.

Mr. Rout: No further questions.

[114] *Cross Examination*

By Mr. Nachman:

XQ. Doctor, on your examination of October 21, 1956, when you examined his trunk for bending, what did you find? A. On the examination of the 21st?

XQ. Of the 21st? A. Of the 21st of October, that day he was taken to the dispensary and that was the same day

he allegedly suffered his accident, and he was complaining of low back pain.

XQ. Yes? A. And that day we took the X-Rays.

XQ. Now, Doctor, I asked you what you found in his bending? What were your actual findings, you made the examination, what did you find? A. This patient was complaining of real severe pain, so we found—

The Court: Severe pain where? A. In the lumbar area, and he had limitation of the range of motion of the trunk and spasm of the paraspinal muscles.

XQ. Do you have your report of that examination, Doctor? A. I have a report here.

XQ. Do you have a report of that examination; where are your notes and the report that you made of the notes of that examination of 1956? Do you have how many degrees his motion was restricted? What his reflexes were to the patellar reflex? [115] A. Not on that date.

XQ. In other words, you have no record whatsoever of that date, except for the fact that you examined him. That's the only record you have? A. That's right, but I can recall.

XQ. You can recall from the printed words, that appear from the final decision of the Fondo, in your letter to the Fund, because all you have before you is the letter to the Fund in San Juan, isn't that correct?

The Court: You answer the question.

A. That is correct.

XQ. All you have is a letter that you wrote to the Fondo? Nothing to refresh your recollection as to how far he could bend, what his reflexes were, what his actual allegations of pain were? You didn't take a history, did you? A. No, sir.

XQ. So all you are testifying from is from a piece of paper and your conversation with the attorney for respondent? A. From my piece of paper, let's put it that way.

XQ. Didn't you have a conversation with respondent's attorney? A. Through the telephone, yes.

XQ. Didn't you also go over a list of questions you were to answer on the stand? A. Yes, for 20 minutes.

[116] XQ. Weren't those questions typed out? A. Yes, they were.

XQ. But you have no records with which to answer these questions? A. Well, I have some records here.

XQ. Just that letter? A. The letter.

XQ. Doctor, did you know that after you discharged this man in November 1956, that he prosecuted an appeal to the Industrial Commission for a period of three or four months? A. That I don't know.

XQ. And did you know that he alleged in all those appeals that he had pain, radiating down his right leg? A. That I knew yesterday.

MAX RAMIREZ DE ARELLANO

a witness called by and on behalf of the respondent, after having been first duly sworn, was examined and testified as follows:

Direct Examination

[117] By Mr. Rout:

Q. Please state your full name. A. Max Ramirez de Arellano.

Q. Your address? A. No. 312 Professional Building, Santurce, Puerto Rico.

Q. Your occupation, Doctor? A. Physician and surgeon.

Q. Do you have any speciality in the practice of medicine? A. Neurological surgery.

Mr. Rout: Will you concede the qualifications of the doctor?

The Court: Do you concede the qualifications?

Mr. Nachman: Absolutely.

By Mr. Rout:

Q. Do you know the libelant in this case, Doctor? A. I do.

Q. Will you please point to him? A. The man in the dark blue suit.

Q. Did you conduct an examination of the libelant? A. I examined Mr. Marin Gutierrez on March 15, 1960.

Mr. Nachman: Do you have a copy of the report?

Q. Please state the details of the examination which you conducted. A. I performed a neurological examination on Mr. Marin after taking his history. Physical findings were as follows:

[118] I found one-half inch atrophy of the right calf as compared to the left. The lumbar lordosis was lost. That is, his back was flat. The lumbar curve was erased. There was no list of the back toward either side. There was slight tenderness to pressure to the right of the 5th lumbar spinous process. There was marked tenderness to pressure over the course of the right sciatic nerve and both calves were tender to pressure on squeezing. On the right side the straight leg raising test produces pain at only 30° elevation, the pain starting at the right ankle and radiating up the calf to the popliteal space and back of the thigh. On the left side the test produced pain at the ankle only, and only when the leg is elevated up to 60°. No sensory loss was found. The right ankle jerk was absent; the left was very weak. The knee jerks were moderately brisk and were equal on the two sides. Plantar flexion at the right foot was weak, possibly because of pain in the right Achilles tendon. The patient walked with a slight limp on the right lower extremity. Forward bending was rather limited, the patient reaching only to within one foot from the floor. In summary of positive findings, he showed: one-half inch atrophy of the right calf; absence of the right ankle jerk; strongly positive right straight leg raising sign; loss of lumbar lordosis; limitation of forward

bending; from the history, positive myelogram showing filling defect at L4-5. My impression was probably a herniated nucleus pulposus at L-4-5 or at L-5—S-1.

[119] Q. Did the libelant relate to you the accident of October 21, 1956? A. Yes, he did. He said that in 1956 in October he had slipped while at work, falling in a sitting position.

Q. Did he say what pain he suffered? A. He said by the end of the day's work he had intense pain in the low back, and right inguinal region. He was hospitalized about eleven days and on November 28, 1956, was given his final discharge to duty.

Q. Would you tell us where is the right inguinal region? A. It lies between the thigh and the lower portion of the abdomen.

Q. Did you, Doctor, at my request make an examination of the State Insurance Fund records in connection with the libelant's injuries of 1951, 1956, 1958, and 1959? A. I did.

Q. Will you please state, in your opinion what injuries libelant suffered on October 21, 1956, as a result of his accident? A. Taking the accident as an isolated occasion or in view of the complete history that is available?

Q. I just want your opinion as to the injury he suffered in 1956. A. The fall in 1956 produced a lumbar-sacral pain and pain in the right inguinal region. I believe one would properly diagnose as a lumbar-sacral strain.

[120] If there were further evidence of had one been able to examine the patient and find other signs, one might make a diagnosis of something else. But a history of a fall followed by pain for a month in the lumbar sacral region one would call it only a strain.

Q. In your opinion was libelant left with any permanent disability as a result of his 1956 fall? A. Again, not having examined the patient after his period of recovery one cannot state categorically. However, he returned to work as

a longshoreman, which is a very heavy, hard work, as I understand it. I assume he had recovered from that injury.

Q. You heard Dr. Rifkinson's testimony, did you not Doctor? A. I did.

Q. And you have stated your own opinion to us just now. Can you state for us with what degree of medical certainty a diagnosis can now be made of the result of libelant's accident in 1956? A. You mean as to diagnosis of the injury produced?

Mr. Nachman: Your Honor, I object. That's not what Dr. Rifkinson testified to. Dr. Rifkinson didn't make a diagnosis as a result of the accident. He was asked a hypothetical question as to proximate causation, and I think this isn't the right way to cross-examine Dr. Rifkinson by putting Dr. Ramirez on the stand and saying, with what degree of medical certainty, [121] because the hypothetical question is placed in terms with reasonable medical certainty, and now talking between the degrees of medical certainty by the doctor, I don't think we are talking the same language. He isn't cross-examining Dr. Rifkinson, nor Dr. Ramirez. This is his own witness. If he wants opinions of Dr. Ramirez I think he has the right to ask him.

Mr. Rout: Your Honor, I believe this question goes to the heart.

Mr. Nachman: Then I submit the question should be rephrased.

Mr. Rout: Goes to the heart of the issue in this case. I think that the parties, the attorneys realize the problem of medical proof in connection with injuries similar to the one before the Court. In this case the libelant has the burden of proof. I think the period of time which has elapsed, the ability to properly present expert testimony—

Mr. Nachman: Your Honor, I object. This is no place

for speeches. If he wants to get on the stand and talk about how he was prejudiced in getting expert testimony I am perfectly willing for him to take the stand.

The Court: He is arguing in support of his question. Let him argue.

Mr. Rout: I believe that my question goes to the heart of the medical testimony in this case.

The Court: Let me hear the question repeated, please.

[122] (The question was read back by the Reporter.)

The Court: Objection overruled. You may cross-examine later.

Mr. Rout: Excuse me. I think the very first phrase of the question in being repeated was not read, and I think on the basis of Dr. Rifkinson's opinion, which you heard, and on your own, and then the question was asked.

(The two questions and answers previously given were thereupon read back by the Reporter.)

A. I don't believe that a person could put a figure to any certainty as to the diagnosis. One can make what you might call an informed guess as to what condition occurred during an injury like that, based on the history alone. It would be very difficult to say that such a guess is so many per cent accurate.

Q. Is there anythingelse you want to say in answer to that question, Doctor? A. No, sir.

Q. What factors were most important to you in the statement of your opinion? A. As to his diagnosis at the moment?

Q. As to your opinion, what factors do you place most reliance upon? A. My opinion about what?

Q. About libelant's injury of October 21, 1956.

[123] A. Based on the fact that the patient suffered a fall in a sitting position, which is capable of producing a strain in the lumbar region, he had pain in the lumbar region and in the right inguinal region. The history given

to me, he had no other pain. He returned to work within five weeks. Taking those things into consideration and not having access to any physical findings, my impression was that that episode was a lumbar-sacral sprain. I have to take all those things together. You can't take only one item and say that is the crucial finding.

Q. In your opinion can an individual suffer damage or deterioration to his annulus fibrosus without any subjective realization that he has? A. I believe that a person can suffer minor damage to the annulus fibrosus and be unaware that anything has happened at all, without there being any particular pain. I know that fully half of my patients in my private practice who come with symptoms of herniated nucleus pulposus and are subsequently shown to have such a defect can't recall at all any particular injury to the back. Persons who do not do heavy labor and did not perform unusual work at home, they state, well, I just gradually began to have pain, and it gradually increased until it got to this stage. So these persons evidently have suffered a deterioration of the normal consistency of this annulus fibrosus which permits it to bulge from the internal pressure but they have not been aware of any particular moment [124] or incident which one might call a cause.

Q. Now you stated, Doctor, that the libelant in your examination of him told you that the results of the myelogram was positive, is that correct? A. I beg your pardon?

Q. I believe you stated that the libelant told you that the results of a myelogram recently performed was positive? A. That is correct.

Q. Did you examine the State Insurance Fund records in connection with the July 31, 1959 injury of libelant? A. I did.

Q. Did you see any report which indicated the positive finding of a myelogram? A. No. The references to the

myelogram I saw were a report by Dr. Joseph Brinz, who stated the myelogram was negative.

Mr. Rout: No further questions.

Cross-Examination

By Mr. Nachman:

XQ. Would it make any difference to you in diagnosing his present condition whether or not the myelogram was negative or positive? A. No, sir.

XQ. So the fact that the myelogram was negative does not alter your opinion that the man is now suffering from a herniated nucleus pulposus? A. No.

[125] XQ. Did you find any evidence in the record that there were some positive X-rays indicating a herniated disc at L-4, L-5? A. No, sir.

XQ. Did the most recent Back Committee X-Rays indicate— A. I have not seen any report of Back Committee X-Rays.

XQ. Now, Doctor, you stated that it is possible for a person to suffer a herniated disc, or a herniation of the annulus fibrosus without later recalling the exact time of the injury? A. That is correct.

Q. Doctor, is it possible, though, to suffer a herniation or a degeneration of the annulus fibrosus and a consequent herniation of the nucleus pulposus without trauma of some kind? A. I think it is possible in this manner: The annulus fibrosus and the disc, the nucleus pulposus, which make up the intervertebral discs has a very poor blood supply. It is one of the structures of the body which begins to degenerate at the earliest age; because of this poor blood supply it is subject to this early degeneration and this degeneration takes the shape of weakening of the annulus fibrosus, and also changes in the nucleus pulposus. The consistency may change and therefore I believe that explains a great number of these who come to me and

have no recollection of any particular injury. I think they are just persons who have a tendency to—

XQ. If that's occurring within a person's body would he [126] not have multiple herniations of his discs? If this process were going on in a person and they were just degenerating wouldn't they all degenerate or most of them, or some of them? A. Multiple herniations of discs are not rare occurrences.

XQ. But when you have multiple discs do you look for the trauma or a degenerative disease? A. No, you take the history. If there is an injury we make a note of it. If there is no injury that the patient can recall we make a note of that.

XQ. Let me put it another way. When you have a herniated disc do you suspect an injury immediately? A. We do.

XQ. So it is quite common that injuries occur to the disc as a result of trauma? A. As we can determine about fifty per cent.

XQ. And the other fifty per cent you don't know that they don't come from trauma? A. You know that the patient cannot recall any trauma.

XQ. You know that they can't recall trauma of a particular instance, is that correct? A. Of a particular instance.

XQ. Now, Doctor, before you were asked the question which read, "Can you state for us with what degree of certainty a diagnosis can be made as to the accident of 1956." You were asked for a diagnosis of that accident, weren't you? [127] A. Yes, sir.

XQ. Are doctors in the habit and are you in the habit of making a diagnosis on people that you don't see? A. No.

XQ. Or on information elicted by someone else? A. You may be asked opinions as to what the persons may have in presenting such a history and findings and we can give an opinion, what we call a "curb stone consultation."

XQ. Would you say that the information available from the Fondo records as to the history of the 1956 accident were adequate to make a diagnosis? A. There are no physical findings given in that thing so a definite diagnosis could not be rendered.

XQ. So that when you say that there is a lumbo-sacral strain you are basing it on what is in the record without evidence of physical findings? A. That is correct.

XQ. So that if the physical findings indicated in fact that there was such and such a limitation of the trunk and the straight leg raising on the right was positive or that the right ankle jerks were diminished you would have an entirely different conclusion as to what this man suffered in 1956? A. If some of those things were present, yes. Some of this limitation of forward bending could still be part of the strain.

XQ. It could also be part of a sprain? [128] A. If you did the straight leg raising test after the ankle jerks had been diminished that would be a neurological sign. The others are presumptive signs, of nerve conditions. But they are positive signs.

XQ. Doctor, you assumed that he recovered from whatever injury he suffered in 1956 and this assumption is based solely upon the fact that he went back to work? A. That is correct.

XQ. Without any regard whatsoever to the physical findings or complaints? A. Correct.

XQ. And he has been working off and on in Ponce as a longshoreman? A. Yes, sir.

XQ. And you regard that as heavy work? A. I understand longshoremen's work to be heavy labor.

XQ. Now Doctor, in your opinion is he today qualified to do that kind of work? A. As of this date I would say he should not do that kind of work.

XQ. Didn't you suggest that you would operate upon him when he came to your office? A. I still think that he should become operated on.

XQ. Did you suggest that you would operate on him when he came to your office? A. If he should become my patient I would.

[129] XQ. Would you refer to your report, please, Doctor, and read us the entire history without isolating in the middle the section pertaining to October, 1956? A. There is a correction on the fourth line. Instead of "right calf" it should be "left calf."

XQ. Wouldy ou read us the entire history? A. The patient states that he had an accident in 1951 when he slipped, falling in a sitting position with a sack of fertilizer in his hands. He could not get up because of pain in the lower back and right inguinal region. He was hospitalized about four month with back pain in the left calf. He was treated with the diagnosis of sciatica. He finally was given compensation for fifty per cent loss of his physiological functions. Two years later he returned to work as longshoreman. In October, 1956, he again slipped while at work, falling in a sitting position. By the end of the day's work he had intense pain in the low back and right inguinal region. He we hospitalized about eleven days and on November 28, 1956 was given his final discharge to duty. The State Insurance Fund said he had no disability. The patient appealed to the Industrial Commission who confirmed the ruling in a letter to the paitent. The patient returned to work as a longshoreman but said he could not work with sacks. He also gave up carpentry work as sawing and planing caused pain in the right hip. He says that his right leg tends to go to sleep. Coughing [130] produces pain in the right lumbo-sacral area but the pain does not radiate. Also he has a more constant pain located in the right calf and Achilles tendon.

On July 31st, 1959 the patient slipped again with aggravation of the symptoms.

XQ. That's enough, Doctor. From this history and the entire picture, can you say with any degree of reasonable medical certainty what role the 1951 accident plays in his present condition? A. In 1951 the patient fell as he did in 1956, landing on his buttocks, having low back pain and pain in the left calf. We don't know the physical findings at that time. From the history alone as in the case of 1956, from the history alone, one suspects sciatica, possibly from a herniated disc at that time. What role that plays in his present condition—

XQ. In his present condition? A. It is possible that that fall weakened one of his intervertebral discs and could have been a contributing factor to further production of pain even on the other side.

XQ. Now, Doctor, didn't you tell us that you read these entire records, the Fondo records, as requested by the attorney for respondents? A. Yes.

XQ. You found no physical findings of the 1951 accident whatsoever, or didn't you make note of them? [131] A. I didn't make a note of them, and I don't recall seeing them.

XQ. You didn't see anything about diminished sensation of the left leg and radiating pain down the left leg and the diagnosis of sciatica in the left leg? A. As I recall one diagnosis that was in that case of lumbo-sacral strain also.

XQ. Yes, the first diagnosis was lumbo-sacral strain in 1951 just as 1956.

Mr. Rout: I would like to request that the file be made available to the Doctor. He might not have had a complete look at it and it wasn't made available for him down at the State Insurance Fund. His memory may not serve him exactly.

The Court: I believe that counsel is looking for the

exact place in the record, and then of course he will have to give it to the Doctor for examination.

By Mr. Nachman:

XQ. Doctor, let me find the report. Excuse me, Doctor. Rather than take up time I will come back to it, if I may, at a recess.

Doctor, in 1951 he had these symptoms. It seemed to clear up according to the history you have taken? A. That is correct.

XQ. He had no more sciatica on the left. Doctor, would you say that this was a proximate cause, this accident of 1951, [132] of his present condition? A. It is possible.

XQ. I am asking you, in your opinion was it? A. Well, I still have to say it is possible, because he still has a little sign that can be related to it, lifting the left leg to sixty degrees he still gets pain in the left ankle.

XQ. Is that a proximate cause in any way of the condition with his right leg? A. Yes, in the sense that they both may be related to the same disc trouble.

XQ. Doctor, between 1951 and 1956, after he returned to work in 1951 he worked without incident and testified here on the stand that the pain gradually left him. Would you say that he had recovered from the 1951 accident? A. Yes, I would.

XQ. Do you agree with what Dr. Rifkinson testified that, if there was a herniation of the left side side in 1951 and a subsequent accident that it would be more likely to rupture in the same spot that it had ruptured before? A. That is the usual thing.

XQ. And isn't it relatively unlikely that a disc at the same level would rupture at a different spot in a subsequent accident? A. Unlikly, you say? It is not as likely.

[133] XQ. Do you agree with Dr. Rifkinson when he said that therefore the 1951 accident in his opinion was not a proximate cause of his present condition which he shows

of a herniated disc on the right side on an entirely new accident because it is at a different level? A. It is possible that it is at a different level, but one cannot demonstrate that, of course.

XQ. No. 1 only asked if you agreed with his premise. A. Repeat it again, please.

XQ. Dr. Rifkinson, as I understood his testimony, said that he was of the opinion that the 1951 accident was in no way a proximate cause of his present condition because the scientific evidence indicated that a rupture at the same level is likely to occur at the same spot as the former rupture. Therefore this accident or this trauma in 1956 or 1959 caused a rupture in a different space, either at the same disc or in a different disc and therefore was unrelated to the 1951 accident.

Mr. Rout: I object to the question on the grounds that he is stating what Dr. Rifkinson testified to, and I think the proper question might be an assumption of facts. But a question as difficult and complicated as that, which is somewhat ambiguous, as I understand it, might be misleading to the witness.

Mr. Nachman: I asked the Doctor as I understood Dr. [134] Rifkinson's premises, and I think the Doctor is able to answer me whether or not he agrees with the premises as he stated them, or not.

The Court: And he himself heard Dr. Rifkinson. He may correct you and say he didn't hear Dr. Rifkinson say this or that. Objection overruled. A. We agree that a subsequent herniation is most likely to occur at the site of the original herniation, but the injury that produced the original herniation is not at one isolated spot in the disc. The whole disc has undergone a strain. The other side—I would like to point out a little thing on the chart. Running through the spinal column is a very heavy fibrous band, which occupies this space. The thickness of that

band is what makes most of the herniation occur laterally because it would be difficult for them to occur on the band. But any injury producing herniation here has also put a strain on the entire annulus fibrosus which being very thick towards the front withstands the strain fairly well. But toward the rear where it is thinner the strain is not stood as well. So the injury in 1951 not only against the side on which he felt the pain, but the other side also has been strained. I have had patients who tell me spontaneously that last year they had pain on the left side and this year they have pain on the right side. Whether it is the same disc or a different one I cannot tell because not having a myelogram on the patient [135] where one can compare with the present one, one cannot say.

By Mr. Nachman:

XQ. Well, the point is, they had an injury to that disc, to any particular disc, we agree that it is more likely that a subsequent injury will occur at the same place? A. It is more likely.

XQ. Therefore, that the relative mathematical odds are that it is either another disc or a trauma of such sufficiency that it produced a lesion in another part of the disc. Do you agree? A. That it produced further weakening in another part of the same disc, yes.

XQ. Now, Doctor, when you stated in your history that after 1956 he said he could not work with sacks. Would that indicate to you that the 1956 injury was productive of more than a lumbo-sacral strain no matter what it said in the Fondo records of the time of the examination? A. Actually, my history was rather vague at that spot, because I can't recall that when I was taking the history and as I wrote it down and dictated it just when this inability to work with sacks started.

XQ. Doctor, you did say that after 1959 his symptoms

were aggravated. You got that history, didn't you? A. I believe I did.

XQ. So, Doctor, if he aggravated the symptoms he may have [136] had them before 1959 or you wouldn't have written them down that way, would you? A. That is right.

XQ. So after the 1956 accident he had these symptoms of pain in his right leg and he had symptoms of coughing producing pain, and inability to lift sacks. Now having that in mind and isolating the 1956 accident as Mr. Rout has asked you to, adding that to the Fondo records, would you say this is merely a lumbo-sacral strain? A. The subsequent development suggests more a herniation of the nucleus pulposus.

Mr. Nachman: Thank you, Doctor.

XQ. Now, Doctor, how did he describe the 1959 incident? A. As I recall, he was reaching for a sling. I don't know what you call the thing, coming down, and he got off balance, but he caught himself on the ropes of the load. At that time he felt severe pain.

XQ. He didn't have any fall in 1959? A. He did not fall.

XQ. Do you remember the Spanish words that he used as to what happened? A. Sometimes I make notes of Spanish words, but I have only "slipped again."

XQ. Doctor, do you recall whether he used the words "me falsio la pierna"? A. It could be.

[137] XQ. I don't mean to suggest but I am asking if he used the words, because those are on the accident report of the Fondo. Doctor, I want you to assume that while holding onto the sling and making a reaching motion, his leg gave way and he had an aggravation of these symptoms. Would you say in your opinion that the 1956 accident, played no role in this process? A. It could have.

Mr. Nachman: No further questions.

Redirect Examination

By Mr. Rout:

Q. Doctor, do you know of the authority Philip Lewin? A. I know Dr. Lewin.

Mr. Nachman: I object. I know of no way of substantiating an expert's testimony by the use of textbooks and thereby get textbooks into evidence. I understand the use of textbooks in cross-examination, but there is no way you can get textbooks in evidence into the record by examining your own witness.

The Court: I have read a very recent decision on that, in which they hold very definitely.

Mr. Rout: I haven't offered any textbooks in evidence, whether or not the witness knew Dr. Philip Lewin.

The Court: The witness may in his main testimony say that his findings are supported by the masters of his profession and refer to textbooks and so forth, and then the opposing party may bring the textbooks precisely cited by the expert on [138] cross-examining him to show that he is wrong. But that's all that is permitted.

Mr. Rout: You mean you can use it on direct but you can't use it on redirect? Do I understand Your Honor to say?

The Court: Well I don't believe because the redirect is only to bring up any new matters.

Mr. Rout: That is correct.

The Court: That are the consequence of the cross-examination, but not new matters that were not touched on the cross-examination.

Mr. Rout: That is correct, Your Honor.

The Court: What's the purpose of the question?

Mr. Rout: The purpose of the question is to read to a witness a statement of an expert's opinion, which I would like to ask the Doctor if he agrees with, in respect to diagnosis.

The Court: Then you will be considering the redirect as a cross-examination of the cross, and that's not permitted. That's not the purpose.

Mr. Rout: Counsel on cross-examination raised the issue as to the degree of certainty of the medical opinion and that having been raised on cross-examination it would appear proper to continue that subject on redirect.

Mr. Nachman: Bring Dr. Lewin.

The Court: You don't need to use the book. You can ask the Doctor. The expert witness is brought to the stand because [139] of his expertness, not because of somebody else's expertness.

Mr. Rout: I merely want to ask him whether his opinion coincides.

The Court: He does not have to agree with any opinion. You may ask his own opinion and from the Court's point of view, the Doctor's own opinion is more valuable than any textbook that you may bring.

Mr. Rout: I wanted to ask this witness' opinion.

By Mr. Rout:

Q. Do you agree, Doctor, that an absolute differential diagnosis of a patient immediately after he suffers a back injury may be impossible? A. I agree with that.

Q. Would you tell us what a differential diagnosis is, with respect to back disorders? A. It is a consideration of the various things that might be at hand, the symptoms, history, the findings, and what they mean. Does it mean herniated disc in this case, a lumbo-sacral strain, a fracture? All those things are a differential diagnosis. You try to differentiate between the ones that are and are not.

Mr. Rout: No further questions.

Recross Examination

By Mr. Nachman:

XQ. Doctor, for how long a time is it advisable to wait in order to make a definite diagnosis of an injury to the [140] back?

Mr. Rout: Objection.

Mr. Nachman: On what grounds?

Mr. Rout: It is beyond the scope of the redirect examination.

Mr. Nachman: I merely want to know how long. I am not out of scope.

The Court: The only thing, I believe you shouldn't use the word "definite." You didn't use the word "differential." You used "definite."

Mr. Nachman: I withdraw the question.

By Mr. Nachman:

XQ. For how long should a doctor wait after a back injury in order to make a differential diagnosis? A. You begin considering a differential diagnosis as soon as you see the patient. Sometimes a diagnosis must be established within a matter of hours, if there is a paralysis to the legs you have to make a diagnosis, and use X-rays and lumbar puncture, to know whether you have to operate immediately. In that case the diagnosis must be established in a matter of hours. In other cases, which are minor, and the patient is ambulatory, you may establish the definite diagnosis at the end of a week, two weeks, three weeks, four weeks.

XQ. Sometimes could it run as far as months in order to be sure? A. It depends on the intensity of the symptoms. [141] XQ. Let's take the case we have here, where a man is seen and we don't know any of the findings at the time of the injury, but that he is seen and he complains of pain in the lumbar back, and according to the records the right inguinal area. He is given bed rest for a period of time,

and massages and then he is discharged as able to go back to work. Then he develops pain in his right leg, finds it difficult to lift sacks, and this goes on for a period of time. Isn't it easier to make a diagnosis after this radiating pain comes into the right leg than it was before?

Mr. Rout: Objection to the question. It is outside the one question that was asked.

The Court: Objection overruled.

A. In a case like that one would have already made a diagnosis before sending the man back to work. The diagnosis could be changed subsequently.

XQ. Would it be possible under those circumstances I have given you that the diagnosis would be changed subsequently? A. I believe it would.

Redirect Examination

By Mr. Rouf:

Q. On redirect examination you said it might be impossible to make a differential diagnosis of a back injury immediately after the accident occurred, would you state your opinion after the intervention of four years and two trauma to the back as you know have occurred in this case? [142] A. The occurrence of further injury or strain in this case makes it very difficult to evaluate what role each injury by itself plays in the present condition.

Q. You stated that it may be impossible. Would you state, that with the intervention of four years and two injuries that it becomes more difficult that it would be than if there were no intervening trauma, or such a lapse of time? A. I said what?

Q. You said that it may be impossible to accurately diagnose making a differential diagnosis of an injury to the back. A. Immediately after the injury.

Q. Right now I ask you whether the intervention of four years and two trauma as has occurred in this case would

make it more difficult to diagnose or make it easier to diagnose the result of the earlier injury?

Mr. Nachman: Objection. There are two different questions. Diagnosis and the result of the original injury are two different questions.

Mr. Rout: I will withdraw the question and reword it.

Q. Is it more difficult to diagnose a back injury with the intervention of two trauma to the back and the lapse of four years than it would be to diagnose the back injury immediately after it occurred? Do you understand the question, Doctor? A. After four years one may see subsequent developments [143] which would—I would not make a final diagnosis. One week after the injury the picture may be such that you have a certain diagnosis in mind. A month later it may be different, or it may be the same. If further developments occur spontaneously that you feel could reasonably be related to the injury you might change it still further. If other incidents occur to that back then the picture becomes very difficult and hard to evaluate as to what each injury did to the back.

Mr. Rout: No further questions.

Re-Recross Examination

By Mr. Nachman:

XQ. Doctor, it isn't difficult to diagnose his condition at present. You have made a definite diagnosis? A. That is correct.

XQ. And you have stated on cross-examination that you would not say that the 1956 occurrence played no role in that condition? A. That is correct.

XQ. As a matter of fact in your report you don't say that it is definitely the result of the 1959 occurrence alone?

Mr. Rout: Objection. This has already been gone into on cross-examination. My redirect was a hypothetical question.

The Court: You were referring your redirect to intervening accidents and the 1959 accident was one of them. The only thing your question was hypothetical and then he comes to the facts.

[144] Mr. Rout: Exactly, Your Honor.

The Court: Well, he has a right to do that. Objection overruled.

By Mr. Nachman:

XQ. Doctor, in your opinion, do you not state that the 1959 occurrence was the cause of his present condition? A. No.

[146] MARIO RAMIREZ

a witness called by and on behalf of the respondent, after having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Rout:

Q. Please state your full name? [147] A. Mario Ramirez.

Q. Your address, Mr. Ramirez? A. 707 Estancia Street, Caparra Heights.

Q. What is your occupation? A. Chief of operations of the Waterman Steamship Corporation, Puerto Rico.

Q. By whom were you employed on October 21, 1956? A. By the Waterman Dock Company.

Q. In what capacity? A. As superintendent of docks.

Q. Where were you on October 21, 1956? A. At the Ponce pier.

Q. During what hours? A. I was there from the time the "HASTINGS" moored until it departed.

Q. What was the "SS HASTINGS" doing at that port on that day? A. Loading and unloading general cargo.

Q. Describe in detail what your duties were on that day? A. To supervse the loading and unloading of the vessel.

Mr. Rout: May I have this marked as an Identification for respondent, please?

The Court: That will be Identification 9 for respondent.

A TIME DISTRIBUTION OF WORK WAS MARKED IDENTIFICATION NINE FOR RESPONDENT.

[148] Q. I show you respondent's Identification 9, and ask you what that is? A. This is a time distribution of work.

Q. For what date? A. Of October 21, 1956.

Q. For what ship? A. For the "SS Hastings".

Q. For what hold? A. For Hatch No. 2, forward.

Q. Where did you find that document? A. In the records of the company.

Mr. Rout: I would like to offer respondent's Identification 9 in evidence.

Mr. Nachman: No objection.

The Court: It is admitted and ordered marked Exhibit 9 for respondent.

TIME DISTRIBUTION OF WORK WAS ADMITTED IN EVIDENCE AND MARKED EXHIBIT NINE FOR RESPONDENT.

The Court: Let me see it?

Q. I show you respondent's Exhibit 9, and ask you during what hours on October 21, 1956, from Hatch No. 2 forward, were beans being discharged?

Mr. Nachman: It doesn't say on that document what was being discharged, beans or anything else. It just says that the hold was being worked at a certain time, and I object to [149] to any testimony based on the type of cargo.

The Court: Ask him what this name is, because I believe I see "Porto beans" or something like that.

A. Pinto beans.

Mr. Nachman: What's Riggs?

Q. I withdraw the last question.

Mr. Nachman: I withdraw the objection.

Q. I show you respondent's Exhibit 9, and ask you what

that document contains? A. This show the distribution of the commodities, that is, the class of cargo.

Q. The class of cargo that was being discharged from the hold at the time? A. Yes, that was being discharged from the hold at that time.

Q. Now, would you tell us what that document states as to the various types of cargo, and the hours at which they were being discharged? A. This document says here, "rigging".

Q. During what hours? A. 7:00 to 8:00 A. M. Then it says, discharge of bags of Pinto beans from 8:00 to 11:30. Cartons of canned goods from 11:30 to 12:00, and 1:00 to 3:30. And general cargo, that is different kinds of merchandise from 3:30 to 4:00 in the afternoon.

[150] Mr. Rout: I would like this document marked as Identification 10 for respondent?

Mr. Nachman: No objection.

Q. Please state what respondent's Identification 10 is?

LANDING REPORT WAS MARKED IDENTIFICATION TEN FOR RESPONDENT.

A. This is what we call a landing report, short and damaged.

Q. For what period of time does that report pertain? A. From the time the unloading operations of the "Hastings" commenced until they terminated.

Q. Does that include October 21, 1956? A. Yes, sir.

Q. Where did you get that document from? A. From the company's files.

Mr. Rout: I would like to offer Identification 10 in evidence.

The Court: Since there is no objection, it is admitted and ordered marked respondent's Exhibit 10.

LANDING REPORT WAS ADMITTED IN EVIDENCE AND MARKED EXHIBIT TEN FOR RESPONDENT.

The Court: I want to see that.

Q. I show you respondent's Exhibit 10, and ask you by whom it is prepared? A. That was prepared during that period by an employee who leaves San Juan aboard the ship, and would go to each of [151] the ports where the ship was unloading.

Q. And prior to the preparation of this report, what does that individual do? A. He arrives at a port with the ship; the hatches are immediately opened, he inspects all of the cargo and everything that he finds broken like sacks or broken cartons, he goes around in the company of a cooper and he immediately orders that the bags be sewed again, and repaired before being discharged.

Q. Does that report contain an entry with respect to cargo in No. 2 hold of the "SS HASTINGS" on October 21, 1956? A. Yes, sir.

Q. Would you please read that portion of the report which pertains to cargo of beans in the No. 2 hold? A. KB - 1763, Ponce, that's the mark. 4 bags of pinto beans found torn and short in weight. 11 bags of pink beans found torn and short in weight at the time of discharging. Do you want me to read everything in connection with No. 2?

Q. Just in connection with the cargo of beans?

Mr. Rout: I would like to have this document marked Identification 11 for respondent.

PAYROLL FOR UNLOADING OPERATIONS WAS MARKED IDENTIFICATION ELEVEN FOR RESPONDENT.

The Court: Are you going to use this gentleman as a witness? You must put him under the rules.

[152] Mr. Santiago: He is a doctor from the Fondo.

The Court: If he is a doctor, that's all right.

Q. I show you respondent's Identification 11, and ask you what that is? A. That is the company payroll.

Q. Where did you get that from? A. From the company's files.

Q. I now offer respondent's Identification 11 in evidence.

Mr. Nachman: No objection.

The Court: It is admitted and ordered marked Exhibit 11 for the respondent.

PAYROLL FOR UNLOADING OF "HASTINGS" WAS ADMITTED IN EVIDENCE AND MARKED EXHIBIT ELEVEN FOR RESPONDENT.

The Court: Let me see it. You mean this is the payroll for all the unloading operations of the "Hastings"?

Mr. Rout: No, Your Honor, this is just one sheet which was extracted from the payroll.

The Court: Then that's a portion of the payroll?

A. Yes, sir.

Q. I show you respondent's Exhibit 11. Would you state for us again what that is? A. It is a page of the payroll.

Q. Would you state for us what the duties of a cooper are? A. To repair all broken cargo, sew up bags.

Q. Does that document indicate how many coopers were [153] employed that day? And if so, how many were there? A. There were four aboard, and two ashore.

Q. And during what hours did these coopers work, according to the payroll? A. They worked from 7:00 to 4:00 aboard the ship; and from 4:00 to 6:00, and 7:00 to 12:00 at night, during the day.

Q. And what day is that payroll for? A. 21 October 1956.

Q. In connection with discharge of cargo from the "SS Hastings"? A. Yes, sir.

Q. Would you please state whose duty it is to keep the dock clean, while cargo is being unloaded from the vessel? A. The stevedoring company. The Waterman Dock Company.

Cross Examination

By Mr. Nachman:

XQ. Mr. Ramirez, did you have a part in preparing any of these records? A. No, sir.

XQ. And these records are just records kept by somebody in the regular course of business? A. Yes, sir.

XQ. Now, you don't know to your own knowledge, then, whether there were four coopers aboard? A. The practice is always to have coopers aboard the ship.

[154] XQ. That's not my question. You don't have any independent recollection whether on this day there were coopers? A. There were coopers aboard.

XQ. Did you see them? A. Yes, sir.

XQ. Were all five hatches being worked? A. Since it was so long ago, I don't recollect whether all five hatches were working.

XQ. But there are records to indicate this too? A. Yes, there are.

XQ. What do the coopers do with the sacks that are torn? A. They repair them.

XQ. Are all of them repaired before the cargo leaves the hold? A. If it is noted that they are torn, they are repaired.

XQ. I show you respondent's Exhibit 10. I show you this item here in Hold No. 1, and would you translate this item right here? Can you read what that is? A. Yes, sir.

XQ. What does that item say? A. 1 bag pink beans fell from pallet of about 35 feet high to dock floor completely broken and contents scattered.

XQ. That means that the bag fell in Ponce, is that correct? A. That's right.

XQ. And the coopers couldn't repair that aboard the ship, could they? [155] A. They could not, because it fell off of the pallet.

XQ. Now how many of these coopers were devoted to

sewing? A. Well, they have the duty of repairing boxes and sewing bags. They have no specific duty.

XQ. They all can sew? They all can repair? A. Yes, sir.

XQ. Where do they stay when they do this? A. They walk back ann forth all over the vessel in the company of this gentleman who makes that report—that is, the aboard-ship coopers.

XQ. Well, you also have coopers ashore? A. Yes, sir.

XQ. And they take care of the stuff that the coopers aboard aren't able to do before the stuff is unloaded, is that correct? A. Exactly.

XQ. So that when you started working on this hatch, and started unloading beans at 8:00 in the morning, if you couldn't take care of all the broken bags the boys ashore would take care of them? Is that correct? A. No, sir.

XQ. Why not? A. Because there is an order that every bag that is torn in the hold of a ship, in the stow of a ship, is to be placed to one side so that this gentleman can make a note of it, and [156] then the coopers fix it up as they do with the rest of the cargo.

XQ. Then will you explain to me, sir, why the notations that they were found torn at the time of discharging, rather than before discharging? I refer you to this note? A. At the moment of discharge. The discharge includes the moment when the bag is placed on to the stow.

XQ. Who makes this notation that they were found torn? A. This gentleman.

XQ. And he can't take care of all the hatches at that time? A. At that time, and now the foremen have instructions that they should take each torn bag and place it to one side.

XQ. But you have no knowledge whether or not these instructions were carried out to the letter, do you? A. No, I don't remember.

XQ. And you don't know of your own memory, do you,

whether or not there were beans or other produce on the dock that day? A. I don't remember.

XQ. Are you familiar with the making out of the payroll? A. Yes, sir.

XQ. And is it a requirement of the company to put down the Social Security number of every worker? A. Yes, sir.

Mr. Nachman: I call upon the respondent to produce the [157] entire payroll record. I offer the entire payroll record in evidence. Any objection?

Mr. Rout: No objection.

The Court: It is admitted and ordered marked Exhibit 2 for libelant.

PAYROLL RECORD WAS ADMITTED IN EVIDENCE AND MARKED EXHIBIT TWO FOR LIBELANT.

XQ. Now, Mr. Ramirez, do you know how many people were aboard this ship on this day, working for the Waterman Dock Company? A. I don't remember how many gangs there really were. I would have to consult the records.

XQ. I take it that these records are just for the 7:00 to 4:00 shift, is that correct? A. I would have to see them to answer that.

XQ. No, there are some here that go to 11:00 P. M., but I show you these records and ask you if you can estimate how many workers there are in these pages?

Mr. Rout: Your Honor, I object. The document is in evidence. I think the document speaks for itself. It contains the number of people in the payroll.

Mr. Nachman: I am perfectly willing. We will do it this way.

XQ. On this page in hatch No. 1, Mr. Ramirez, it shows 13 men working in the hold from 7:00 to 4:00 P. M.? Would that [158] be correct? A. Yes, sir.

XQ. And it shows two tackermen? Would that be correct? A. Yes.

XQ. And it shows 12 men ashore? I take it they are movmoving and stacking this cargo? A. Yes.

XQ. In No. 2 forward, it shows 11 men? A. Yes.

XQ. And two tackermen? A. Yes.

XQ. 11 men ashore? A. Yes.

XQ. Then in hold No. 2 aft, it shows 11 men in the hold? A. Yes, sir.

XQ. Two tackermen? A. Yes, sir.

Q. 12 men ashore? A. Yes, sir.

XQ. Also from 7:00 to 4:00 P.M., in hold No. 3 forward?

Mr. Rout: I object to the line of questioning. It seems to be outside the scope of the direct examination.

Mr. Nachman: These records were introduced by him. I can question these records.

Mr. Rout: It is irrelevant for the purpose of my direct [159] examination. If Mr. Nachman wants to make this man his witness, he can do so.

The Court: Objection overruled.

XQ. No. 3 forward, 11 men in the hold? A. Yes.

XQ. Two tackermen, and 12 men ashore? That's also 7:00 to 4:00 P. M.? A. Yes.

XQ. In hold No. 3 aft, it had also worked 7:00-4:00 P. M. and had 11 men in the hold? A. Yes.

XQ. Two tackermen and 8 men ashore? A. Yes, sir.

XQ. Hold No. 4 forward had 15 men in the hold? A. Yes, sir.

XQ. That's also 7:00 to 4:00 P. M. Hold No. 4 aft had 15 men aboard? A. Yes, sir.

XQ. Two tackermen and 8 men ashore, also 7:00 to 4:00 P. M.? A. Yes, sir.

XQ. Hold No. 5 and 11 men inside the hold; two tackermen and 8 men ashore? A. Yes, sir.

XQ. Now, this is 4:00 to 12:00; this is 4:00 to 6:00; this

is 4:00 to 6:00; this is 4:00 to 12:00; 4:00 to 12:00; [160] 4:00 to 12:00. Now in addition to all those men, there were 10 men cleaning aboard? A. Yes, sir.

XQ. And there were 10 men ashore stacking and classifying cargo? A. Yes, sir.

XQ. This is 4:00 to 12:00; and this is the morning shift, and this is the morning shift. And you also in addition to this, had both aboard and ashore, 9 foremen aboard and 5 foremen ashore? And a chief foreman? A. Yes, sir.

XQ. And in addition to that, you also had water-carriers, coopers, and motormen? A. That's right.

XQ. All those men were working aboard the ship between 7:00 and 4:00? A. Aboard and ashore.

XQ. I ask you, Mr. Ramirez, to look at these records and see if you find anywhere the Social Security numbers are not attached? A. Yes, there is Social Security here.

XQ. On all of them? A. There is one here without any Social Security, Abraham Hernandez.

XQ. Are there any others? [161] A. Here's another who is a foreman, Eusebio Mercado Perez. There are two more here who are coopers, Ruben Retamar and Domingo Medina.

Mr. Rout: Objection again. I question the relevance.

Mr. Nachman: I can question the weight of any evidence that has been in evidence, and if I am questioning it because the two coopers don't have Social Security, or there is one man and one forman who don't have the Social Security, I can question it.

Mr. Santiago: Are you attacking the evidence which is presented by you?

The Court: It is obtained from the respondents.

Mr. Nachman: I don't care who it is presented by.

The Court: Objection overruled.

XQ. So, although there were four coopers aboard, two

of them have no Social Security numbers? A. Well, there were four coopers.

XQ. You can only say there were four coopers, based on these time sheets? A. Yes, sir.

XQ. You don't know when this time sheet was prepared, do you? A. Yes.

XQ. When was it prepared? A. Immediately after the ship terminates the unloading, [162] in order to pay the workers.

XQ. Did you have any hand in the preparation of this? A. Well, after the ship is finished, I check it to see that the number of workers is in agreement with the number who were to be employed, that were ordered.

XQ. And do you recall whether Ruben Retamar and Domingo Medina were aboard? A. Yes, they were aboard.

XQ. And why aren't their Social Security numbers attached? A. Many times they don't have their Social Security number on them, and the time keeper remembers it and writes it down. And the timekeeper can't write it down, because he does not have the number.

XQ. This is your final payroll, is that correct? A. Yes, sir.

XQ. How do you withhold for Social Security for these two men? A. I don't know, because the company accepts it in this form and that's all I know about it. That was in 1956.

XQ. One other thing. Looking at these records, sir, can you tell me first of all, what is a tackerman? A. A man who works on the apron. The man who receives the draft on the pier.

XQ. Would you tell me, please, who were the tackermen on hold No. 1, from 7:00 to 4:00? [163] A. According to this record, Felipe A. Roman and Ramon Cerna Martinez.

XQ. Those records you have had ever since October 1956, have you not? A. The company has them in its files.

XQ. And they have never left the files of the company? A. I can't tell you whether they have left or not.

XQ. Where did you get them? A. I asked the company auditor for them.

XQ. And he had them in his possession? A. Yes, sir.

XQ. They are kept in the regular course of the company's business, aren't they? A. Yes.

XQ. So that if anybody representing the company, or any other company wished to find out who the tackermen were in hold No. 1, and whether in fact they were working on that day, you have that evidence, do you not?

The Court: I believe you are arguing with the witness.

Mr. Nachman: I am not arguing with the witness. I want to know if the records were there?

The Court: The presumption was that the records were kept. Unless evidence to the contrary is offered, they were available to everybody, including the company. It is a matter for the record. I know all these questions are for the purpose [164] of the defense of laches.

Mr. Nachman: Yes, sir.

XQ. Would you please tell us, who were the tackermen in Hold No. 2?

Mr. Rout: On that very respect, I renew my objection once again. If he would like to call this witness as his own, I think he can do so.

Mr. Nachman: I am perfectly willing to make him my own witness for this purpose.

A. According to these records, Carmelo Fraticelli and Federico Marin Gutierrez.

XQ. Do you know Federico Marin Gutierrez? A. Well, by sight.

XQ. Do you see him here in the Court room? A. That man over there.

The Court: Let the record show that he is pointing to the libelant.

XQ. Please tell me who were the tackerman in Hold No. 2 aft? A. In accordance with this record, Alberto Anaviteto and Manuel Quirindongo Cintron.

Mr. Nachman: No further questions.

(The witness was excused.)

Mr. Rout: To facilitate the testimony of Dr. Bayonet, I would like to request a recess at this time to enable the [165] doctor to review the State Insurance Fund records, as he has requested to do so.

The Court: Will ten minutes recess be enough?

Mr. Rout: Will that be enough to examine Yes, that will be enough.

The Court: Because I don't want to continue this case until tomorrow.

NATALIO BAYONET JIMENEZ

a witness called by and on behalf of the respondent, after having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Rout::

Q. Please state your full name? A. Natalio Bayonet Jimenez.

Q. Your address, please? A. Hermanas Davila, First Street, Bayamon.

Q. What is your occupation? A. I am a physician and surgeon.

Q. By whom are you employed, Doctor? A. By the State Insurance Fund of Puerto Rico.

Q. Do you know the libelant in this case? A. I know him. [166] Q. Would you point to him please? A. He is sitting over there.

The Court: Let the record show that the Doctor points to the libelant.

Q. What are your duties, Doctor, in connection with

your employment by the State Insurance Fund? A. I am the medical director in charge of all the medical services of the State Insurance Fund.

Q. And what are the duties of the medical director? A. To coordinate all the medical services and give medical assistance to men injured at work, that report to the State Fund, provide all medical assistance including hospitalization, out-patient, and furnishing of specialists and special medicines and hospitalization for these injured workmen.

Q. Do you have anything to do with the fixing of disabilities of injured workmen? A. I also have to intervene in the fixing of certain disabilities by the State Insurance Fund.

Q. Did you examine the records of the State Insurance Fund which pertain to the injuries of the libelant in this case in 1951 and 1956? A. Yes, sir, I did.

Q. In your opinion, Doctor, did the libelant suffer permanent disability as a result of his injury of 1956?

Mr. Nachman: I object, Your Honor.

[167] The Court: I believe that is such a general question.

Mr. Rout: I will withdraw the question at this time, Your Honor. Did you intervene, Doctor, in connection with the accidents of the libelant in 1951 and 1956?

Mr. Nachman: I object, unless I know in which capacity the Doctor intervened, since he has several capacities, doctor, medical director, and administrator, and fixing of compensation awards.

The Court: You may cross examine on that. Objection overruled.

Q. You may answer the question, Doctor? A. I had to examine the patient in 1951 after he had been discharged from treatment, to evaluate if there was any residual disability from the accident he suffered.

Q. And what were your findings in that examination? A. According to the records, I signed a report together with Dr. Pinero who was my assistant, and examined the patient, and decided that he had a 50 percent disability—

Mr. Nachman: I object, and move that the last portion of that answer be stricken, inasmuch as it is a basis for an award of compensation under a different statute entirely. And it is not responsive to the question.

Mr. Rout: We submit the Doctor stated he examined the patient, and intervened in his capacity as medical director, and he is merely stating his conclusions.

[168] The Court: But his conclusions for the purpose of evaluating any disability, pursuant to the Workmen's Compensation Act has no bearing on this case, so that portion of the answer in which he says about evaluating should be ordered stricken. That does not mean that the Doctor, as a professional, may not say what he noticed in the physical state of libelant at the time of discharge.

Q. Doctor, will you please state the physical condition of libelant at the time you fixed the disability, and upon which the disability was based?

Mr. Nachman: Objection to the form of the question.

The Court: Objection sustained. Forget the disability in his official capacity.

Mr. Rout: I submit, Your Honor, that although the finding of the State Insurance Fund under the Workmen's Compensation Law isn't binding on this Court, or isn't conclusive in any way, it would appear this has inferential relevance to the physical condition he found the man in, and it is impossible in his function as a medical director to necessarily separate what his findings were, as distinguished from his physical condition.

The Court: I believe he can. What he notices in the physical state of a patient, this type of injury, he is in this and this way, and that's that. Now, for the purposes

of the State Insurance Fund he has to follow certain rules in [169] order to evaluate that, and that's not admissible here. We had the other day, the case of Dr. Fernandez testifying that a certain disability although medically this disability was so much, for the purposes of the insurance Fund it was only 30 percent, 40 percent, 50 percent.

Mr. Rout: I will re-word the question, but it would appear to me that irrespective of the exact standard used in fixing disability, there is some connection between the disability—

The Court: The relevance is the actual physical disability that he found. That is what concerns the Court.

Q. Please state the physical disability that you found in 1951? A. The patient was complaining of severe back pain, radiating along the sciatic nerve, and he had a limitation of the movements of the trunk. This was compatible with a diagnosis of a herniated disc.

Q. Doctor, you stated that you reviewed the record of the Fondo in 1956, is that correct? A. I reviewed the record in connection with the 1956 injury, yes.

Q. Did libelant suffer a permanent disability as a result of the 1956 injury?

Mr. Nachman: I object. There is no foundation whatsoever laid for the direct testimony—

The Court: Unless you qualify the question, I am going to [170] sustain the objection. You may ask the same question, what disability did he find in the body of the libelant after the 1956 accident, if any?

Q. What permanent disability, if any, did libelant suffer from?

Mr. Nachman: I object, the same reason.

Mr. Rout: I haven't finished.

Q. On the basis of your examination of 1956 records?

Mr. Nachman: I object. There is no testimony that the

Doctor examined this man in 1956. The record speaks for itself.

Mr. Rout: The record isn't in evidence.

Mr. Nachman: Whatever portion of the record that is here—you have already had the doctors who examined the libelants in 1956 testify, and this doctor is not qualified to testify as to that.

Q. Did you examine the man in 1956? A. It does not appear in the record that I did.

Q. Do you want to review that record one more time? A. This man was examined, according to this record, by Dr. Eduárdo Gonzalez. He was a medical inspector on my staff.

Q. What does that record indicate, Doctor?

Mr. Nachman: I object, Your Honor.

The Court: What's the question?

(The question was read back by the Reporter.)

[171] Mr. Nachman: This is a medical examination for purposes of fixing an award, isn't that right, Doctor?

Mr. Rout: Just a moment, please?

The Court: Is that record in evidence?

Mr. Rout: No, Your Honor.

The Court: Then I can't permit you to ask any question as to what the record shows, unless it is in evidence.

Mr. Rout: Does this record have a signature on it? A. It does.

Mr. Rout: I would like to have this document marked as Identification 12 for respondent.

The Court: It is Identification 12 for respondent.

A MEDICAL RECORD OF THE STATE FUND WAS MARKED IDENTIFICATION 12 FOR RESPONDENTS.

The Court: If you are going to continue to examine this witness, we will have a recess and continue this afternoon.

Mr. Rout: I would be finished with him probably in about 10 minutes.

The Court: You know, I told you before I was going to work until 12:00, whether it is more convenient to recess until 2:00. You take 10 minutes, and then he will take 15 minutes more.

Mr. Nachman: I am not going to take anything, Your Honor.

The Court: All right, go ahead.

Mr. Rout: I now offer respondent's Identification 12 [172] in evidence.

Mr. Nachman: I object, Your Honor.

The Court: Objection sustained. That document does not amount to anything, as regards evidence of the physical condition of this libelant.

Mr. Rout: Your Honor, it is submitted that—

The Court: This Doctor is generally saying something without any basis whatsoever, and then making reference to his previous accident, and his previous incapacity, and saying that simply he is applying the Workmen's Compensation Act, whereas regarding a case like this, it serves no purpose.

Mr. Rout: This examination says in part that there was no incapacity found.

Mr. Nachman: I object.

The Court: You can not read that in the record.

Mr. Rout: It is in connection with the medical report, and it includes not only the language of the compensation awards, which seem to be so offensive, but that it also includes a medical examination which is a part of the State Insurance Fund record and the bases upon which Dr. Bayonet's department acted. There are other documents in that record also.

The Court: Perhaps under the shop book rule, this is admissible.

Mr. Nachman: There is no evidence that there was a medical examination there.

[173] The Court: He said that the libelant was examined today.

Mr. Nachman: But there is no report of any examination. This is only for purposes of evaluation.

The Court: Well, that would be the weight to be given to that. Objection overruled. The document is admitted and ordered marked Exhibit 12 for respondent.

MEDICAL RECORD OF STATE INSURANCE FUND WAS ADMITTED IN EVIDENCE AND MARKED EXHIBIT 12 FOR RESPONDENT.

Mr. Rout: Aside from Exhibit 12, I show you the State Insurance Fund record of 1956. Does that record show any report of a medical examination?

The Court: Is this document in evidence? You better mark it for identification, and ask him what it is.

Mr. Nachman: I object to the entire State Insurance Fund file. We are dealing with shop book records only as to medical treatment and hospital records.

Mr. Rout: It is appraent that proctor for libelant is trying to restrict the presentation of evidence with respect to medical examinations of this man at the time he was injured. I think there is nothing more relevant to this case than that. We have had medical testimony four years and two accidents afterwards, and it would seem medical examinations of this man and official records in a government agency—

The Court: Yes, medical records, so that all portions are not material to the case. You offer everything you have [174] as to examinations.

Mr. Rout: I would like to ask the witness if he finds a medical examination in this file. Is there any objection to that?

Mr. Nachman: No.

The Court: Of course, that's something that should have been done while we were in recess.

Q. Does that document, besides Exhibit 12, contain any

other report of a medical examination of the libelant? A. There is a decision of the Industrial Commission which is subscribed by the medical inspector of the State Insurance Fund, and the medical—

Q. Does that decision contain a report of a medical examination? A. It does.

Q. Are there any other reports of medical examinations? A. Yes, there is another one on the 26th of November in Ponce, by Dr. Iguina.

Mr. Rout: I would like to have these two documents marked.

The Court: Mark them as Identification 13 and Identification 14, only the portions that are offered.

REPORT OF DR. IGUINA WAS MARKED IDENTIFICATION 13 FOR RESPONDENT.

REPORT OF INDUSTRIAL COMMISSION WAS MARKED IDENTIFICATION 14 FOR RESPONDENT.

[175] Mr. Nachman: I object to both. Your Honor already ruled Exhibit 13 inadmissible when Dr. Iguina was here. And I object to Identification 14 because it is an administrative finding based upon the compensation system of the State Insurance Fund.

The Court: This was rejected?

Mr. Rout: Apparently it was, Your Honor. I didn't realize it was the same one that was offered when Dr. Iguina was here.

The Court: And this is the other one?

Mr. Rout: Yes, sir.

The Court: You are offering them in evidence?

Mr. Rout: Yes, I am.

The Court: Objection sustained as to both.

Q. On the basis of the medical examinations, Doctor, which you found in a study of the 1956 record, what was the conclusion which the examining doctors came to with respect to libelant's disability of 1956?

Mr. Nachman: I object, Your Honor.

The Court: It is hearsay. He says he has never examined this libelant.

Mr. Rout: These are the official medical records of the State Insurance Fund. They have to come to a conclusion.

The Court: Are they in evidence? If they are in evidence I grant an expert could be shown those documents in evidence [176] and state his own conclusions, but if they are not in evidence you are asking the Court to permit the witness to refer to documents which have been rejected by the Court. Objection sustained.

Q. Doctor, you reviewed the 1956 record of the State Insurance Fund, is that correct? A. Yes.

Q. If you will assume that Dr. Iguina had come to this court room and stated that in his opinion that the libelant suffered no permanent disability as a result of his 1956 accident, would you agree with that, professionally?

Mr. Nachman: I object to that, Your Honor.

The Court: Objection sustained.

Mr. Rout: Your Honor, I would like to re-submit that question and support it with argument, if I may.

The Court: Do you want to wait until 2:00? I will recess until then.

Mr. Rout: All right, Your Honor, I would appreciate that.

The Court: All right. We will take a recess until 2:00.

(The noon recess was then taken.)

The trial was resumed at 2:00 in the afternoon, all parties and their counsel being present as before.

Direct Examination of Dr. Bayonet Continued

[177] By Mr. Rout:

Mr. Rout: I would like to have this document marked for identification.

The Court: That will be Identification 15 for respondent.

SPECIAL MEDICAL REPORT WAS MARKED IDENTIFICATION 15 FOR RESPONDENT.

Q. Doctor, you stated you examined the libelant in 1951, did you not? Is that correct? A. I did.

Q. I show you respondent's Identification 15, and ask you that this is? A. This is a special medical report signed by myself and Dr. Pinero.

Q. Does it contain physical findings and a diagnosis of libelant's injuries? A. It does.

Mr. Rout: I would like to offer respondent's Identification 15 in evidence.

Mr. Nachman: Your Honor, I have no objection to the first 2 paragraphs, or the next to the last paragraph of this document. The third paragraph I submit is inadmissible because it contains something other than a medical finding. I have no objection to the other portions being read into the evidence.

The Court: You object to the 3rd paragraph?

Mr. Nachman: Yes, Your Honor.

[178] Mr. Rout: I will withdraw so much of that document, Your Honor, as pertains to the

The Court: To the incapacity? All right, it is admitted with that limitation, on condition that a translation into English accompany it.

SPECIAL MEDICAL REPORT WAS ADMITTED IN EVIDENCE WITH LIMITATION, AND MARKED EXHIBIT 15 FOR RESPONDENT.

Q. Would you please read into the record the physical findings and the diagnosis contained in that medical report?

The Court: Why is that necessary, if the document is in evidence all the doctor would do is to repeat what the document says.

Q. What was the medical conclusion that you came to on the basis of your findings and diagnoses? A. That this

man was disabled on account of physical findings pertaining to a herniated disc.

Q. Now, Doctor, you examined the State Insurance Fund record in connection with the 1956 injury, is that correct? A. Yes, sir.

Q. And did that State Insurance Fund record contain reports of a medical examination? A. It has two reports pertaining to medical examinations.

Q. Did those medical reports contain diagnoses of libelant's 1956 injury? A. It implies a diagnosis.

[179] Q. Would you please tell us what that diagnosis was?

Mr. Nachman: I object, Your Honor, to the implication.

The Court: Objection sustained. The best evidence would be the certificate of the doctor.

Q. Would you please find the medical reports which contain the diagnosis of libelant's 1956 injury? A. There is a report of the Industrial Commission doctors.

Mr. Nachman: I object. This isn't in evidence.

A.—identified as Number 14.

Mr. Nachman: This document was rejected in evidence, Your Honor.

The Court: You cannot show the contents of the document, that is, Identification 14, which was already rejected.

Mr. Rout: At this time I would like to submit to the Court that the witness, in his professional capacity, has stated that there are medical records in the State Insurance Fund file, and that those medical records contain a diagnosis of the 1956 injury of the libelant, and on that basis and on that identification of documents by the witness himself, in his professional capacity, it is re-submitted at this time, in view of those facts.

Mr. Nachman: Your Honor, they had the best evidence here, Dr. Iguina, who made the diagnosis and examined libelant.

Mr. Rout: If this is cumulative evidence, it will be withdrawn on the basis that this witness would only say what Dr. [180] Iguina would say. This report wasn't prepared by Dr. Iguina.

Mr. Nachman: This report isn't admissible under any circumstances. It is an examination made solely for the purposes of a medical award.

Mr. Rout: It is a medical examination, in any case.

The Court: You see, in the first place, there are no medical findings here. It is simply that the doctors said they examined the record, the "expediente" the file with relation to the claim that was denied by the Fondo del Seguro del Estado, the State Insurance Fund, and they don't find any aggravation from that file. I don't think they are medical findings.

Mr. Rout: Your Honor, it is submitted that there was an examination by these doctors of other physical findings which are now in evidence, and on the basis of their own examination of the libelant and their own examination of previous files which are on record they are making a statement as to the medical condition of the libelant, and it would seem that that chain of circumstances establishes the validity also for the diagnosis of the injury to libelant.

The Court: Objection sustained.

Q. Doctor, you stated that you examined the medical records in the 1956 file, is that correct? A. Yes, sir.

Q. And you examined the diagnosis contained therein? A. Yes, sir.

[181] Q. And you also examined the libelant in 1951, and made certain physical findings? A. Yes, sir.

Q. Will you please state, if, in your opinion, libelant suffered a permanent injury as a result of the 1956 injury?

Mr. Nachman: Objection.

The Court: Objection sustained.

Mr. Rout: No further questions.

Cross examination

By Mr. Nachman:

XQ. Doctor, when you examined the patient in 1951; the original diagnosis was lumbar sprain, is that correct? A. Originally it was lumbar sprain.

XQ. And after a period of time that was changed to herniated disc, is that correct? A. Yes, sir.

XQ. What period elapsed between the original diagonsis of lumbar sprain and the final diagnosis of herniated disc? A. I can not tell you off-hand, but if I can examine the record perhaps I can get an idea. In March there is a medical report by Dr. Sheplan, an orthopedic surgeon, where he believes there was some low back pathology, and that's when—and there is a physical examination later. Dr. Sheplan suggested that he be seen by a neuro-surgeon, and he was seen by Dr. Richardo Cordero, who found the possibility of the [182] patient having a herniated disc. It was more or less the middle of March.

XQ. That was three months after the accident? A. Roughly about three months after the accident.

XQ. So to make a diagnosis on a disc depends on symptoms that develop after the original trauma? A. That is true.

XQ. When you evaluated that 1951 case, you stated on direct examination that there was diagnosis of sciatica that led you to this diagnosis of a herniated disc? A. Yes, sir.

XQ. On which side was that sciatica, Doctor? A. It was on the left side.

XQ And since you made that evaluation in 1951, you have not medically examined this patient at all? Since June 1951, you have not examined this person at all? A. I don't recall examining him at all.

XQ. And you have no personal knowledge about his present condition, or about anything that happened to him

after you authorized his return to work in 1951? A. No, I don't.

Mr. Nachman: No further questions. Excuse me, I do have another question.

XQ. May I see Exhibit 12, please? Doctor, would you explain to me please the second sentence of Exhibit 12? [183] A. This is a special medical report signed by Dr. Eduardo Gonzalez.

XQ. What does the second sentence of that report mean? A. It says he was examined on November 27, 1956, and was found recovered and without disability of the accident of October 21, 1956. And that the limitation of function does not represent more than 50 percent of the general functions.

XQ. In other words, when he said, if I understand correctly the State Insurance Fund terminology, when it says he recovered without incapacity, the second sentence explains that the incapacity is no greater than that for which he had already been given an award some five years earlier? A. What it really means is that he didn't acquire any additional disability from the second injury of 1956, above 50 percent.

XQ. In other words, if he got better, after he went back to work in 1951, and his condition had improved up to the time of the accident in 1956, so he was no longer a 50 percent disabled person, then the 1956 accident didn't make him any worse than he was after the date of the award of 1951? A. That could be a possibility.

Mr. Nachman: Thank you, Doctor.

The Court: Any further questions to the Doctor? On re-direct?

Mr. Rout: Just one last question, Your Honor.

[184] *Redirect Examination*

By Mr. Rout:

Q. Is it also a possibility, Doctor, that that report means that he returned to the condition he was in immediately prior to the injury of October 21, 1956? A. That is another possibility.

Mr. Nachman: Doctor, there are no physical findings in this report, are there? There are no physical findings in this report? It is just a conclusion that he is cured without incapacity, there is no physical findings as to limitation or anything else? A. It does not say so, but he had to evaluate that before he could emit that opinion.

Mr. Nachman: But you don't know what those findings were? A. As far as I understand this report—

Mr. Nachman: No, Doctor, you don't know what the findings were?

Mr. Rout: Objection. The Doctor is in the middle of answering the question.

A. I could answer that, but I will have to explain.

Mr. Nachman: Go ahead.

A. He does not say so, but when he is referring to the 1951 accident, I know that those are the findings he is trying to express here. Otherwise he couldn't refer to that accident.

[185] Mr. Nachman: But his actual words are, the only physical findings that he makes are that the limitation of function is no greater than 50 percent? That's the only physical finding in this whole report, isn't that correct? A. No, there is opinion.

Mr. Nachman: I am not talking about the award of incapacity, that isn't a medical finding at all? A. It is in a sense. You cannot evaluate disability unless you make an examination.

RESPONDENT'S EXHIBIT NO. 4

GOVERNMENT OF PUERTO RICO
STATE INSURANCE FUND
MEDICAL DIVISION
San Juan, P. R.

ORDER FOR X-RAY EXAMINATION

Injured worker: Federico Marin
Employer: Waterman Dock Company
Case No.:
Date of Accident: 10/21/56
Date of Order: 10/22/56

Age: 49

Dr. William Gelpi
Ponce, Puerto Rico

Anatomical Region Lumber to (illegible) vertebrae
Clinical Summary He claims that upon trying to hold a draft he slipped falling in a seated position the pavement feeling pain in the hips, his waist and the inguinal region on both sides.

Upon examination there is no external evidence of trauma in the lumbar region.

DR. JOSE DEL PRADO
Medical Officer

X-RAY REPORT

10/12/56
Date

45. Slight osteo-arthritic changes in fifth lumber
Negative for (illegible)

DR. (illegible)
Radiologist

RESPONDENT'S EXHIBIT NO. 6

COMMONWEALTH OF PUERTO RICO
STATE INSURANCE FUND
San Juan 8, Puerto Rico

Employer: Fill in immediately upon occurrence of the accident and hand to injured worker.

Case No.
Policy No. 63525
Key 3749 Group 372
Daily Wage 8.005
Weekly Comp. 24
Part of the Body
Nature of Lesion

READ INSTRUCTIONS ON THE BACK.

REPORT OF ACCIDENT AT WORK

A EMPLOYER

1. Name of Employer Brown & Root Carioe Inc.
2. Postal Address Box 1990, Ponce, P. R.
3. Kind of business Engineer's Constructor
4. Place of Business Tallaboa, Penuelas, Puerto Rico
5. Indicate the product or principal article harvested or manufactured or the service rendered by the business Construction

B INJURED WORKER

6. Name of injured worker Federico Marin Gutierrez
7. Address Playa de Ponce, 34 Matadero Street, Ponce, Puerto Rico
8. Age 48
9. Sex M
10. Civil Status Married
11. Usual Occupation of injured person Carpenter Helper

12. How long has he been working for you? three months
13. Was the injured person doing his usual work when the accident occurred? Yes
14. For how long has he been working at his present occupation? 5 years

C Salary or Wage Basis

If the injured person worked:

15. By the day:		Indicate daily wages
16. By the hour	1.00	Indicate wage per hour
17. By the week		Indicate weekly wage
18. By the month		Indicate monthly salary
19. By contract		Indicate daily earnings (average)

20. As a sharecroper state: (a) Whether any contract signed before a notary, judge or labor agent.
(b) Daily wage computed according to the customary wage on the farm or neighborhood:

D Occupational Accident or Disease

21. Date of accident: 25 Day Month March 1958
22. Time accident occurred 3:45 P.M.
23. Time the injured commenced to work on day of accident. 7:00 AM
24. Place, ward or town where the accident occurred Jobsite, Tallaboa, Penuelas, P.R.
Place *Ward* *Town*
25. What was the injured doing when the accident happened Carrying a piece of lumber
.....
(Be specific—if using tools or materials show what he was doing with them)
.....
.....

26. Did the injured stop work as a result of the occupation accident or disease? Yes

27. If the injured worker left his work, state the date on which he did so 26 March 1958

28. Describe in detail how the accident occurred. While he was carrying a piece of lumber slide and feel pains (sic) in the right inguinal region and right lumbar region.

If occupational disease is alleged, report the claims of the injured worker.

.....

(Give a good description of what happened and how it happened. State the objects or substances involved and state their relation to the accident).

29. What vehicle, machine, tool, object, or substances caused the occupational injury or disease. Piece of lumber

30. State the parts of the body injured. Right inguinal region & Right Lumbar Region

E WITNESSES:

31. Witneses who saw accident according to employers investigation:

Name	*Adaress*
TOXIN GRACIA	Brown & Root Caribe Inc.

F OBSERVATIONS:

32. Make any observation you deem pertinent in connection with this alleged accident.

G SIGNATURE

33. I certify that this report is true and correct.

34. In Ponce P.R., this 26th of March of 1958
town *day* *month* *year*

35. Signature of employer or authorized representative.

BROWN & ROOT CARIBE INC.

(signed) J. WALTER SMITH

Recross Examination

By Mr. Nachman:

XQ. But you don't know what findings he made from this? A. He confirms the 50 percent, then he should have the same findings that he had in 1951.

XQ. But you have no way of knowing what findings Dr. Gonzalez made? A. I couldn't really say it, but I know.

XQ. All you can say was that there was limitation of function? A. Yes.

XQ. Which is not greater than the 50 percent disability?

Mr. Rout: I think this is outside the scope. I would like to ask the Doctor if he would want to comment any further with any other medical report that he stated was in the record, as long as he has an opportunity to discuss what the report [186] of the record is.

Mr. Nachman: The other record is Dr. Sheplan's report, but it has no bearing on Dr. Rivera or Dr. Gonzalez's findings. I am only examining him on a document in evidence. If you want to submit Dr. Sheplan's report, go ahead.

Mr. Rout: I withdraw that.

RESPONDENT'S EXHIBIT NO. 1

COMMONWEALTH OF PUERTO RICO
STATE INSURANCE FUND
San Juan, Puerto Rico
CLAIMS DIVISION

SWORN STATEMENT
Re: Case No. 5Y-17173
Injured: Federico Marin Gutierrez
Employer: Waterman Dock
Accident: illegible

On this 28th day of November, 1956, at 10:15 A.M. and at the place Claims Division SIF, in the Municipality of San Juan, P. R. appears before the investigator Mr. Ramon Torres Navarro, the deponent Mr. Federico Marin Gutierrez and after the admonitions of law voluntarily states as follows:

INVESTIGATOR:

Raise your right hand.

Do you solemnly swear to tell the truth, the whole truth and nothing but the truth?

DEPONENT:

Yes, sir.

Your name: Federico Marin Gutierrez

Your age: 48 years.

Married or single: Married

Tell me exactly where you live: No. 49 Matadero Street, Ponce, Playa, Ponce, P. R.

What is your job and where do you work? I work on the apron at the pier in Ponce for Waterman Dock.

What is your wage? We earn 1.53 per hour.

How many hours do you work each day? 8 hours straight time.

What was the name of the person in charge of the work: Mario Velazquez.

What did you come here for today? They sent me from Ponce to be examined.

What was it that happened to you? Just as I was about to receive the draft apparently the winch man from inside drew back on the sling load and carried me making me fall to the pavement and upon falling I could not get up because I felt a severe pain in my waist and part of the inguinal region.

At what time did this accident occur? At 10 o'clock in the morning.

What witnesses were there at that moment? Carmelo Fraticelli and Manuel Quirindongo Cintron.

What did they do with you when that accident occur? Well I stood it until 3:30 and went to the office to fill in the forms and later the minor surgeon sent me over to Dr. Pila's Clinic.

Before this accident, which you claim happened to you on the 21st of October 1956, had you had any accident at work? Yes sir. In 1951 when I was working for the Oliver Firm.

On what part of the body did you receive injury in that accident you say you had in 1951? On the waist and on my left leg which hurt me a lot.

Did you receive any compensation from the Fund for disability in connection with that 1951 accident? Yes sir. I received a 50% disability which they awarded me.

Have you had any other accident after these you have mentioned? A. Yes before the accident for which they gave me 50% disability I had another accident and I only got per diems.

Do you have anything else to add to this statement?
Nothing else.

Do you know how to read and write? Yes sir.

I certify that I have read the above statement, that it is complete in all its parts, that is, that the questions and answers are correct.

(signed) Federico Morales (sic) Gutierrez
Deponent

I certify that the above statement was given to me this 28th day of November, 1956 by Federico Marin Gutierrez in San Juan, P. R.

(signed) Ramon Torres Navarro
Investigator.

RESPONDENT'S EXHIBIT NO. 2

11/5/56

Commonwealth of Puerto Rico
State Insurance Fund
San Juan 8, Puerto Rico

Employer: Fill in immediately upon occurrence of the accident and hand to injured worker.

Case No.
Policy No. 66
Key 7309 Group 309
Daily Wage 15.60
Weekly Comp. 20.00
Part of the Body
Nature of Lesion

READ INSTRUCTIONS ON THE BACK.

Report of Accident at Work

A Employer

1. Name of Employer Waterman Dock Company
2. Postal Address San Juan, P. R.
3. Kind of business Shipping
4. Place of Business Playa Ponce, P. R.

5. Indicate the product or principal article harvested or manufactured or the service rendered by the business

B Injured Worker

6. Name of injured worker Federico Marin
ssn 581-07-5392
7. Address No. 34 Matadero Street,
Ponce Playa, P. R.
8. Age 49 years
9. Sex M
10. Civil Status Married
11. Usual Occupation of injured person
Longshoreman
12. How long has he been working for you? illegible
13. Was the injured person doing his usual work when the accident occurred? Yes
14. For how long has he been working at his present occupation?

C Salary or Wage Basis

If the injured person worked:

15. By the day: Indicate daily wage:
16. By the hour Indicate wage per hour
1.95 p.h.
17. By the week Indicate weekly wage
18. By the month Indicate monthly wage
19. By contract Indicate daily earnings (average)
20. As a sharecroper state: (a) Whether any contract signed before a notary, judge or labor agent.
(b) Daily wage computed according to the customary wage on the farm or neighborhood:

D Occupational Accident or Disease

21. Date of accident 21 Oct 1955
22. Time accident occurred 10:00 A.M.

23. Time the injured commenced to work on day of accident. — 7:00 AM

24. Place, ward or town where the accident occurred #2 hold forward ashore SS Hastings

Place Ward Town

25. What was the injured doing when the accident happened — (*Be specific—If using tools or materials show what he was doing with them.*)

26. Did the injured stop work as a result of the occupational accident or disease? No

27. If the injured worker left his work, state the date on which he did so.

28. Describe in detail how the accident occurred. When the worker held the draft which was swinging the worker slipped falling in a seated position feeling pain over the inguinal and lumbar region.

If occupational disease is alleged, report the claims of the injured worker.

.....

(Give a good description of what happened and how it happened. State the objects or substances involved and state their relation to the accident).

29. What vehicle, machine, tool, object, or substance caused the occupational injury or disease. Fall

30. State the part of the body injured. Inguinal region — Lumbar Reg.

E Witnesses:

31. Witneses who saw accident according to employers investigation:

Name *Address*

Manuel Quirindongo Cintron
Las Parcelas — Playa Ponce

Carmelo Fraticelli Ruiz
Caracoles

F OBSERVATIONS:

32. Make any observation you deem pertinent in connection with this alleged accident.

G SIGNATURE

33. I certify that this report is true and correct.

34. In Playa Ponce, P.R., this 21st day of October
town *day* *month*
of 1956
year.

35. Signature of employer or authorized representative. (signature illegible)

H REPORT OF STATE INSURANCE FUNDS
PHYSICIAN, MINOR SURGEON OR NURSE

36. Name of injured worker Federico Marin
37. Occupation Longshoreman
38. Age 49
39. Right or left handed? Right
40. Name of employer WATERMAN DOCK CO.
41. Address Ponce
42. Date of alleged accident 10/21/56
43. Date first examination 10/22/56
44. History of alleged accident or occupation disease as stated verbally by the worker.
When trying to hold a draft, slipped falling seated on the pavement feeling pain in the hips, waist and inguinal region both slides.
45. Result of X Ray examination if any was made
Negative for fracture of lumber vertebra
46. Diagnosis on the date of first examination
Alleged pain in lumber region following alleged contusion. No ext. evid. of trauma in lumbar reg. Temp. 37 degrees. Has reg. spasms. Warm water bags. A. S. A.
47. Prognosis Fav. An. Urine — ng.
48. Treatment X Ray Flexin

49. Probable length of treatment 3 weeks
50. Does the injured worker's condition have or have not any relation with the verbal history which he gave of the alleged accident? Yes
51. State the diseases, anatomical deformities or congenital or original incapacities prior to the accident Scar one third anterior half leg leg pterigion both eyes, in 1951, was hospitalized in Dr. Pila's Clinic and Prof. Building for the same condition.
    (a) Examination on sight. No.
    (b) Complete general physical examination. Yes
    (c) Was the described physical incapacity compensated by the Fund? No
52. Does he require hospitalization No
53. Clinic to which referred
54. Did you authorize injured worker to work? No
55. Date
56. Recommendations
57. Signed at Ponce, P.R., this 24 of October 1956
58. Signature Dr. S. Saez
    Title Surgical Traumatic and Rehabilition Center, Ponce

H RESULT OF STATE INSURANCE FUNDS
PHYSICIAN, MINOR SURGEON OR NURSE

36. Name of injured worker
Federico Marin Gutierrez
37. Occupation Carpenter's helper
38. Age 48
39. Right or left handed? Right Handed
40. Name of employer BROWN & ROOT CARIBE, INC.
41. Address Tallaboa, Penuelas
42. Date of alleged accident 3 25 58
43. Date first examination 3 26 58
44. History of alleged accident or occupation disease as stated verbally by the worker.
He claims that while carrying some boards he stepped into a hole on which loose soil had been spread and his foot slipped on taking a miss step and latter when placing the board he felt a sharp pain in right inguinal region and in lumbar region.
45. Result of X Ray examination if any was made
.....
46. Diagnosis on the date of first examination
On examination presents an inflamed right inguinal ganglion very painful on palpation. No external evidence of trauma in lumbar region nor history of trauma. Temp. 37 degrees. Negative urine analysis.
47. Prognosis
48. Treatment
49. Probable length of treatment
50. Does the injured worker's condition have or have not any relation with the verbal history which he gave of the alleged accident? No relation.

51. State the diseases, anatomical deformities, or congenital or original incapacities prior to the accident: Scaring erosion upper arm left lateral aspect scar, middle aspect left index finger, callouses in palm both hands, (rest illegible).
    (a) Examination on sight. No
    (b) Complete general physical examination. Yes
    (c) Was the described physical incapacity compensated by the Fund?
52. Does he require hospitalization No
53. Clinic to which referred
54. Did you authorized injured worker to work?
55. Date
56. Recommendations
57. Signed at Ponce, P.R. this 26th of March 1958.
58. Signature Dr. Jose del Prado
    Title Surgical Traumatic & Rehabilitation Center, Ponce

RESPONDENT'S EXHIBIT NO. 7

Commonwealth of Puerto Rico
State Insurance Fund
San Juan 8, Puerto Rico

Special Medical Report
Re: Case No.
Worker: Federico Marin Gutierrez
Employer: Brown & Root Caribe Inc.
Date of Accident: 3-25-58

I have examined this date and in this Central Dispensary at Ponce the above named worker who alleges that while he was carrying some boards he stepped upon a hole on

which loose soil had been placed and that he made a misstep and slipped, and that latter when he placed the board in its place, he felt a sharp pain in the inguinal region, right side and in the lumbar region.

An analysis of the urine was made and was negative.

Upon examination of the lumbar region there is no external evidence of trauma nor is there any history of trauma. He presents a right inguinal ganglium which is inflamed and very painful on palpation, a condition which bears no relation to his alleged accident. Temperature 37 degrees centigrade.

No Relation.

Previous condition: scaring erosion on the upper third of the left arm lateral aspect, scar on the middle phalange dorsal aspect of the left index finger, callouses on both palms, small ulcer on the distal inter-phalangial articulation of the right little finger, a scar on the third half of the anterior right leg, tattoo on right forearm, scars on the right half and lower anterior aspect of the left leg.

(signed) Dr. Jose del Prado
Surgical Traumatic &
Rehabilitation Center
— Ponce

3-26-58

I agree: Dr. Gabriel Zamorano
(signature illegible)

RESPONDENT'S EXHIBIT NO. 12

COMMONWEALTH OF PUERTO RICO
STATE INSURANCE FUND
San Juan, Puerto Rico

SPECIAL MEDICAL REPORT

Re: Case No. 5Y-17173
Worker: Federico Marin
Employer: Waterman Dock
Date of Accident: 10-21-56

The above named injured worker having been examined on this date he is found to be cured and without disability from his accident of 10-21-56. The limitations of functions are neither as much as nor more than 50% of the general physiological functions. This patient received a 50% disability of the general physiological function for the accident which occurred on 1-10-51 consisting in a severe lumbar sprain.

(signed) EDUARDO GONZALEZ, M.D.
Medical Inspector

RESPONDENT'S EXHIBIT NO. 15

COMMONWEALTH OF PUERTO RICO
STATE INSURANCE FUND
San Juan 8, Puerto Rico

SPECIAL MEDICAL REPORT
Re: Case No. 5-E-255500
Worker Federico Marin Gutierrez
Employer Jaime L. Oliver
Date of Accident 1/10/51

The undersigned physicians have examined the above named worker on this date, in connection with the accident he had on 1-10-51 consisting in lumbar sprain.

Subsequently this worker developed a dislocation of an intervertebral disc, a condition which bothers him in the sense that it limits the movements of the torso and he reports pain when walking or standing up or whenever making any movement.

We estimate that the worker has remained with an incapacity equivalent to the loss of fifty per cent (50%) of the general physiological function. This is a permanent partial incapacity.

Prior to the accident he presented calluses on his hands.

He has been authorized to go to work on 6-21-51.

(signed) N. BAYONET, M.D.
Medical Director

Reviewed and confirmed by
(signed) R. PINERO FERNANDEZ, M.D.
Assistant Medical Director
6-20-51

RESPONDENT'S EXHIBIT NO. 16

WELFARE FUND PRSSA-UTM
Nieves Building, Stop 5
Puerta de Tierra, Puerto Rico

March 21, 1960

Name of the workman: Federico Marin Gutierrez
Social Security : 581-01-5392

REPORT OF HOURS WORKED

Year 1954		
Did not work		
Year 1955		
January-February	Did not work	
April-June	" " "	
July-Sept.	" " "	
Oct.-Dec.	16.75	16.75
Year 1956		
January-March	5.25	
April-June	125.75	
July-Sept.	145.00	
Oct.-Dec.	103.50	379.50
Year 1957		
January-March	54.00	
April-June	173.00	
July-Sept.	168.75	
Oct.-Dec.	300.00	695.75
Year 1958		
January-March	119.00	
April-June	162.00	
July-Sept.	135.50	
Oct.-Dec.	100.00	516.50

Year 1959

January-March	102.25	
April-June	101.25	
July-Sept.	33.50	237.00

I certify that this information is true and correct and that it was obtained from the reports sent to this office by the shipping companies.

(Sgd.) FERNANDO GERMAN
FERNANDO GERMAN
Sub-Administrator

(Sgd.) MYRNA CALDERON
By: MYRNA CALDERON

RESPONDENT'S EXHIBIT NO. 17

ESTADO LIBRE ASOCIADO DE PUERTO RICO
FONDO DEL SEGURO DEL ESTADO
San Juan 8, Puerto Rico

INFORME MEDICO ESPECIAL

Re: Case Num.: 5v-7591
Obrero: Federico Marin Gutierrez
Patrono: Alcoa Steamship Co.
Fecha Accidente: 7-31-59
October 9, 1959

On 31 July 1959 sprained his and developed pain in the low back with radiation into the posterior aspect of the right leg down to the ankle. Was treated at Clinica Pila without improvement.. Lumbar myelogram was performed on 1 Sept. 1959 by Dr. Joseph Brinz and was reported as negative.

At present complains of pain in the low back with radi-

ation down the back of the right leg to the ankle. Also has pain in the back of the neck and down the left leg.

No complaints of numbness, weakness, bowel or bladder disturbance or impotence.

Gives history that in 1951 received an injury to the low back with fracture of the spinal column for which he received 50% compensation.

Examination:

Normal gait. Straight lumbar curve. Some protrussion of the L3 and L4 spinous processes. No scoliosis. Mild lumbar paravertebral muscle spasm. Forward vending to 70° from vertical.

RSLR 70°, LSLR 75°. Lasegue positive on right. Moderate low lumbar interspinous tenderness.

Reflexes—Normal at knee, somewhat sluggish at ankle.

Sensory—normal.

Motor—1 cm. atrophy of left calf. Vehy mild weakness of right foot plantar flexors.

Impression:

There is some subjective evidence of nerve root irritation on the right. The objective finding of mild atrophy of the left calf may be a residual of the previous spinal injury.

Recommend:

1) Obtain record and X-Rays of old accident.
2) Please have our radiologist review the myelogram X-Rays.
3) Refer to Back-Committee.

(s) Jose A. Alvarez de Choudens, M.D.
Jose A. Alvarez de Choudens, M.D.
22 Oct 1959

JAAC/mda

STENOGRAPHIC TRANSCRIPT OF TRIAL

FELIX A. ROMAN

a witness called by and on behalf of the libelant, was examined and testified as follows:

Direct Examination

[87] Q. Have you worked on other ships? A. Yes, sir.

Q. Carrying bagged cargo? A. Yes, sir.

Q. Do they have anybody on other ships to look after the bags? [88] A. Yes, they put the cooper to take care of the bags.

Q. What does he do? A. He sews the bags up.

Q. Now, from the time of this accident, until today, where have you lived? A. In the San Israel ward, Playa de Ponce.

Q. And have you left Puerto Rico during this time? A. No, sir.

Q. And as far as you know, were you listed on the pay records of the Waterman Dock Company, for the day of the accident? A. Yes, sir.

Q. And has anybody ever interviewed you on the part of the steamship company, as to how this accident occurred? A. No, sir.

[92] MANUEL QUIRINDONGO CINTRON

a witness called by and on behalf of the libelant, was examined and testified as follows:

Direct Examination

By Mr. Nachman:

Q. What is your name? [93] A. Manuel Quirindongo Cintrol.

Q. Where do you live? A. At the Parcelas, at Playa Ponce.

Q. What is your occupation? A. I work at the apron at the pire, at Ponce.

Q. Do you know Federico Marin Gutierrez? A. Yes, sir, I do.

Q. Did you see him sustain an accident? A. Yes.

Q. When did that accident occur, if you know? A. That was in October 1956.

Q. Do you remember the name of the ship you were working on that day? A. No, I don't.

Q. Did you see the accident happen? A. Yes.

Q. What happened? A. He was waiting to receive the draft, and when he reached to grab the draft, why he slipped and fell.

Q. Do you know what caused him to slip? A. The waste that falls from the draft, that is, the beans that fall out of broken bags.

Q. Where were you working at the time? A. Almost beside him.

Q. What hold were you working at? [94] A. No. 2 aft.

Q. What did you do when he fell? A. I went to lift him up.

Q. And ~~did you~~ lift him up? A. Yes, I did.

Q. Wasn't he able to lift up by himself? A. No, he couldn't.

Q. What did you do after you lifted him up? A. We carried him on our shoulders over to the corner, to see if he would get over it, but he didn't.

The Court: Let the record show that the statement of the former witness, Mr. Felix A. Roman, who is still in the court room has been delivered to counsel for respondent by counsel for libelant.

Q. After you picked him up, where did you move him to?

A. After I picked him up, we moved him to the corner. Then we took him over to the minor surgeon at the pier.

Q. How long did he stay in the corner? A. About a quarter of an hour.

Q. And who did his work for him? A. We who work at the holds there did his work for him, because we always help each other if anything happens.

Q. When you brought him to the "practicante" was it when the shift was all over? A. No.

[95] Q. What did you do after you brought him to the "practicante"? A. I came back to continue working.

Q. From October 1956 up to the present day, have you resided always in Las Parcelas de Ponce? A. I have lived there ever since January 1942.

Q. And during that time have you left Puerto Rico for any period? A. Never.

Q. Have you ever been approached by anybody from the respondent for a statement or for interview as to how this accident occurred? A. No.

Q. And as far as you know, does your name appear on the payroll records of the Waterman Dock Company? A. Well, it has to be there.

Mr. Nachman: Your witness.

* * *

[211] The Court: The motion to dismiss is denied. Of course, I will not give to the ruling of the Court the weight or the damaging effect that Mr. Nachman quite appropriately wants the Court to give to it, as practically deciding the case in favor of libelant. I will not go so far, and as this is a new question before this Court I will limit myself to denying the motion to dismiss.

Of course, I should advance to counsel, I believe that on the question of unseaworthiness and or negligence, the libelant [212] has made a case, that as regards the question of laches the libelant has shown sufficient excuse for

the delay, and that the only two questions with which the Court is really concerned are the question of the actual physical damage suffered by libelant as a consequence of the October 21, 1956 accident. Whether his present physical state is totally the result of that accident. or whether the accident aggravated in some way his physical state resulting from the 1951 accident, or whether the 1959 accident aggravated and to what extent the previous physical condition of the libelant.

I believe that in order to decide that, it is indispensable that the parties get a transcript of the medical testimony in the case, particularly I want to read pretty carefully the testimony of the two main experts, Dr. Rifkinson and Dr. Ramirez de Arellano. Of course, I have no doubt that part of the present condition of the libelant is due to the 1956 accident, but to what extent, and that's the important thing, in order to determine the damages.

I believe as to the material aspect of the damages I want the parties to discuss that more or less what appears from the evidence as to actual earnings of this libelant, if there is any evidence as to it, because the evidence is very weak in that. That's all I need.

I believe it isn't necessary to file briefs or discuss the exceptive allegations, and I had the opinion that it [213] would have been factual and unnecessary to discuss those exceptive allegations. They are based precisely on what transpired at the trial. They stand or fall on the evidence offered here, so it is not necessary to make a separate discussion of that. Indeed, I believe that what I have said now disposes of the exceptive allegations.

* * *

RESPONDENT'S EXHIBIT NO. 9

Form 107 [illegible]

WATERMAN DOCK CO. INC.

~~SAN JUAN, P. R.~~ [illegible]

Date 10/21/55

NAME ....

FROM	TO	NO. OF HRS.	RATE PER HR.	AMOUNT PAID	CLASS
8	64-		1.93	123.52	

[illegible] TIMEKEEPER

[illegible] ~~DOCK SUPT~~

CANTERO, FERNANDEZ & CO. INC.

TIME DISTRIBUTION OF WORK

[illegible]	7/8 am	8	8
[illegible]	8/11	28	
[illegible]	11/1	4	
	1/3	20	
[illegible]	3/4	4	
		64	

Ident. #9 Resp.

EXHIBIT #9 Resp.
CASE Adm. 4/57
FILED March 23/60
U. S. District Ct. P. R.

-39-

RESPONDENT'S EXHIBIT NO. 10
WATERMAN DOCK COMPANY, INC.
P. O. Box 3628
San Juan, Puerto Rico

October 25, 1956

PONCE LANDING REPORT SS HASTING VOY. 269-EB

Vessel arrived Ponce at 3:18 A.M. Docked at 4:46 A.M. same day. Commenced discharging operations at 7: A.M. October 21, 1956. Sailed for Norfolk at 6: A.M. October 22, 1956.

TONNAGE:	PONCE
Seattle	350.5 Tons
Portland	219.1 "
Stockton	417.2 "
Encinal	419.4 "

WEATHER CONDITION OF LOADING PORTS

1. Seattle	Low Temp. 51	Humidity 90	Precip. Light rain & drizzle.
2. Portland	Low Temp. 50	Humidity 60	Precip. Drizzle (Occasional)
3. Stockton	Low Temp. 60	Humidity 65	Precip. Clear
4. Encinal	Low Temp. 56	Humidity 70	Precip. Drizzle (Occasional)

WEATHER CONDITIONS AT PONCE

The weather condition at Ponce during 7: A.M. until 3: P.M. was Clear. 3: P.M: to 5: P.M. was cloudy. Commenced raining at 5: P.M. and 5:30 P.M. October 21, 1956.

No sign of condensation showed in hatches. Cargo was discharged in apparent good condition except 14 Cartons Fab, 25 Cartons of Libby Cnd Good, 15 Ctns Del Monte Cnd Goods and 3 Cartons Hunts Cnd Goods, found wet in hatch #5 L/H, apparently this damaged was caused by rain in other port.

HATCH #1

U/T/D B 10537 P/Ponce		5 Bags Pinto Beans found torn at time of discharging. Will be short in weight.
	Alice Lover/Ponce	1 Case Preserves found completly. empty. apparently pilfered at other port.
	DM 1411/Mayaguez	1 Case 12/303 Sliced Beets dropped from pallet when this hit the cotttage of the ship from about 30 feet hight. Carton completly wet and crushed containing 3 jars broken.
	Libbys Ponce	7 Cases (QHOA) 24/2 1/2 B Pears and 1 case (0812 A) 48/211 Pear Nectar with all cans dented. Damaged due to a pallet fell from about 30 feet hight when hit the cottage of the ship.
L/H	KB 17903/Ponce	1 Bag Pink Beans fell from pallet of about 35 feet hight to dock floor. completly broken and contents scattere.
	KB 17690/Ponce	5 Bags Pink Beans found torn and short in weight at time of discharging.
	0812 A/Ponce	1 Case 48/12 Pear Nectar found completly empty. pilferred.

	0705/Ponce	1 Case 48/7 3/4 oz. Peach Nectar found completly empty. pilferred.
	Comedores Escolares/Ponce	1 Case 24/2 1/2 Tomatoes found with 1 can short.
	0705/Ponce	1 Case 48/7 3/4 Peach Nectar found with 6 tins pilferred.
	Libby/Ponce	1 Case 48/12 Peach Nectar found with 5 tins short.
L/H	S 8469/Ponce	1 Bag Pink Beans found torn and short in weight.
	Libby/Ponce	1 Case 24/2 1/2 Peaches found with 9 tins pilferred.
	Hunts/Ponce	1 Case 48/8 Peach Slices found with 6 tins short.
	Del Monte/Ponce	1 Case 48/6 oz. Tom Paste found with 28 tins short.
Hatch #2		
Locker	KB 17463/Ponce	4 Bags Pink Beans found torn and short in weight.
		11 Bags Pink Beans found torn and short in weight at time of discharging.
	U/T/D C P Co.	1 Case No. 441 of 1 Gro. Cashmere Bouquet Soap found completely empty pilferred.
	MR. 2837/1 Ponce	1 Case #1 Kitchen Valve found completly empty. pilferred.

C P Co./Ponce	1 Case No. 441 of 1 Gro. Cashmere Bouquet Soap found broken with 62 pieces pilferred.
MR. 2837/1 Ponce	1 Case #2 Kitchen Valve found with 6 pieces pilferred.
COMI Ponce	1 Case 12 1 2 Pts Avosets found with flaps opened containing 1 jar pilferred.
DM 1204 Ponce	1 Case 24/211 Prune Jice found opened with 2 cans short.
C P Co.	2 Cases No. 441 of 1 Gro. Cashmere Bouquet found with 20 pieces pilferred.
	1 Case No. 441 of 1 Gro. Cashmere Bouquet Soap. found with 86 pieces pilferred.
	1 Case No. 413 Cashmere Bouquet Soap with 2 pieces pilferred at pier.
Hatch #3	
Locker M.E.L./Ponce	4 Rolls Floor Covering Pabco found slightly dented.
M.A./Mayaguez	1 Roll Floor Covering found broken in one edge.
M.O.S./Ponce	2 Rolls Floor Covering Pabco found slightly dented on

B T Yonco Ponce	4 Rolls Floor Covering Pabco found slightly dented on center.
U T D DM 1251 Ponce	1 Case 24 211 Pineapple Juice found with 11 tins short.
5208 Ponce	1 Case 72 Tom Juice found with 19 tins short.
XFOJ Ponce	1 Case 12 46 oz. Peach Nectar found with 1 can pilferred.
5505 A Ponce	1 Case 72/8 Tom Jice found with 1 tins short and 1 tin empty.
DM 1098 Ponce	1 Case 12/2 1/2 Fruit for Salad found with 2 cans pilferred.
DM 1200 Ponce	1 Case Stwd. Prunes found with 1 can pilferred.
L/T D Comedores Escolares Ponce	2 Cases 24/2 1/2 Peaches found broken on side containing 11 cans pilferred.
L/T D Comedotes Escolares Ponce	1 Case dropped from stevedores hands. cont. 4 cans dented.
	1 Case 24/2 1/2 Pelled Tomatoes found with a hole on side containing 1 can dented and 1 can pilferred.

		Approx. 12 cases 24 2 1/2 found crushed and broken. Damage apparently due to bundles of plywood San Juan stowed besides cartons.
	RB 17690/Ponce	7 Bags Pink Beans found torn recoopered in same hatch.
L H	Treco 775A/Ponce	2 Bdls Plywood fell from pallet of about 30 feet hight to dock floor. containing 6 panels broken on edges.
Hatch #4		
L H	Fiesta/Ponce	1 Bag F White Beans torn with pressure of the canva sling, will be short in weight.
	Gallo San Juan	1 Bag Rice found completly torn. about 74# pounds short.
	S 600/Ponce	1 Bag S F White Beans found torn short in weight.
	R 18/San Juan	1 Bag Pink Beans found torn short in weight.
	Fiesta/Ponce	11 Bags S F White Beans found torn and short in weight, recoopered in hatch.
	Talon/Ponce	1 Bag Pinto Beans found torn about 50# pounds short.
	3333/Ponce	1 Bag Pinto Beans and 1 bag S F White Beans fell from

	pallet of about 30 feet hight. Bags completly broken and contents mixed
Fiesta Ponce	7 Bags Pinto Beans fell from pallets in same hatch, torn and short in weight. recoopered.
Ponce	5 Bags Beans. 4 bags White and 1 bag Pinto fell from canva sling from 9 feet hight to deck. Bags completly broken and contents scattered.
	3 Bags S F Wite Beans fell to dock floor. completely broken.
	About 78 Bags Beans partly wet on top by rain while covering the hatch. Rain fell October 21, around 5: P.M. and 5:30 P.M.
S 600 Ponce	4 Bags S F White Beans fell from pallet to dock floor. bags torn and short in weight.
Mombo 17461 Ponce	1 bag Pinto Beans torn and short in weight by rough handling.
	All bags that fell from pallets in hatch and dock floor was recoopered in paper bags.

HATCH #5

T/D	Suers. de Trujillo & Subina Inc./Ponce	1 Case No. 5 of 5 Track and Hanger Sets found broken with contents apparently in good condition.
	8167/Ponce	3 Cases 48/1# Salmon found broken with 12 tins pilferred.
L/H	C P Co./Ponce	6 Cases 24/G Fab and 8 cases 24/M Fat Detergent found completly wet and cartons and pkgs broken.
	DM 1114/Ponce	1 Case 24/B Sliced Peaches found with flaps opened containing 8 tins pilferred.
L/H	0806/Ponce	2 Cases 48/B Pear Nectar found with 26 tins short.
	7 W/Ponce	1 Case 24/211 Pineapple Juice found with carton opened containing 3 tins short.
		1 Case 24/211 Pineapple Juice found completly empty. pilferred.
	Villalba/Ponce	1 Case 48/15 oz. Oval Sardines found with 3 cans pilferred.
	0508 A/ Ponce	2 Cases 48/211 Apricot Nectar found with 13 tins pilferred at Ponce.
	DM 1006/Ponce	1 Case 48/B Apricot Nectar with carton broken and tins

	partly dented due to rough handling.
Hunts Ponce	1 Case 72 8 Tom Sauce found broken with 1 tin short.
El Pescador Ponce	1 Case 100 5 Sardines found with 3 tins pilferred.
Libbys, Del Monte and Hunts	About 47 Cartons Cnd Goods found completly wet with its contents wet, slightly rusty and labels stained. Those cartons were stowed under cartons of Fab.
Libbys Ponce	1 Pallets of about 35 cartons of Cnd Goods fell from sling of about 35 feet hight. 90% of cartons completly broken and tins dented.

This damages in hatch #4 and #5 were caused by the failure of crane operators to operate vapor crane properly.

NOTE: According to crane operators the trucks stowed on deck was an obstacle to the free flow of cargo from ship to deck. They hat to lift the cargo higher and as far as watching cargo is concerned was limited because trucks did not allow them to have a clear view of the cargo when it was being unloaded to pier floor.

(s) *M C*

Prepared by: MILTON CARRILLO

[fol. 165] [File endorsement omitted]

MINUTE ENTRY OF ARGUMENT—February 7, 1962

On February 7, 1962, this cause came on to be heard and was fully heard by the Court, Honorable Calvert Magruder, Senior Circuit Judge (by assignment), Honorable Bailey Aldrich, Circuit Judge, and Honorable William F. Smith, Circuit Judge (by assignment), sitting.

[fol. 167]

IN UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 5887

WATERMAN STEAMSHIP CORP., Respondent-Appellant,

v.

FEDERICO MARIN GUTIERREZ, Libelant-Appellee.

[193 F. Supp. 894]

Appeal From the United States District Court for the District of Puerto Rico.

Before Magruder,* Aldrich and Smith,* Circuit Judges.

Antonio M. Bird, with whom Härfzell, Fernandez & Novas was on brief, for appellant.

Harvey B. Nachman, with whom Nachman & Feldstein was on brief, for appellee.

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* Sitting by assignment.

OPINION OF THE COURT—April 11, 1962

ALDRICH, Circuit Judge. This is a libel by a longshoreman for personal injuries sustained on a dock at which respondent's vessel was unloading, allegedly by reason of "improper storage of cargo on said dock." In addition, there were general allegations of unseaworthiness of the vessel and of negligence of its master, officers and crew. The district court made findings in libelant's favor as to [fol. 168] unseaworthiness and negligence and assessed damages. It rejected a defense of laches. Respondent appeals.

The accident occurred on October 21, 1956. Libelant was in the employ of a stevedore unloading respondent's vessel pursuant to contract. The first notice respondent received of the claim and, for all that appears, of the injury[1] was when suit was brought on January 9, 1959. By this date more than twice the period of the analogous statute of limitations had elapsed. The court found, "While working on the dock libelant slipped on [some] beans, twisted his torso and fell upon his buttocks. The injuries sustained by libelant were proximately caused by this unseaworthiness[2] of the vessel, the failure to furnish libelant with a safe place to work and by the negligence of the respondent." With respect to laches the court found that libelant had shown a sufficient excuse by the fact that he consulted counsel within the statutory period, and concluded that respondent was not prejudiced by the delay because the witnesses remained available and respondent had its own "records indicating the cargo damage."

The first question is the responsibility for the beans. The court found that many of the bean bags were defective; that coopers were employed in sewing them up; that nonetheless beans were spilled from the drafts as they were

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[1] Even libelant's employer had no prior notice of the basis of the present claim. Libelant told the State Insurance Fund not that he slipped, as now alleged, but that he fell because he was carried by the sling due to improper action of the winchman.

[2] What was meant by "this unseaworthiness" will be later discussed.

being swung ashore. "On one occasion, according to the records produced by respondent and admitted into evidence, a bag broke open in mid-air spilling its contents all over the dock. This event occurred while a draft from Hold No. 1 was in mid-air and still attached to the vessel. Hold No. 1 is immediately adjacent to No. 2 forward. Beans scattered [fol. 169] about the surface of the pier caused a dangerous condition for the longshoreman. The cargo being discharged was defective and unseaworthy. The ship owner was negligent in permitting the broken and weakened bags to be discharged, when it knew or should have known that injury was likely to result to persons in the service of the ship who had to work on and about the spilled beans. The condition on the pier was caused by the respondent's unseaworthy cargo and its lack of care. In permitting this condition to remain existent, the respondent failed to furnish libelant with a safe place to work."

The quoted portion of the court's opinion contains several errors. In the first place, the respondent's records do not show that the bag broke open in mid-air, but show that it fell from mid-air, and broke when it hit the deck.[3] Secondly, the bag fell, and beans were spilled, whether from there or anywhere else, by no conduct in which respondent was shown to have participated. *Cf. Robillard v. A. L. Barbank & Co.*, D.C.S.D.N.Y., 1960, 186 F. Supp. 193, 197. And it is undisputed, with respect to "permitting this condition to remain existent" on the pier, that respondent had neither control of nor even a right to control that locus. The court's findings as to respondent's negligence cannot stand.

There remains the finding of unseaworthiness of the cargo. One speaks of unseaworthy cargo really in terms of result: rather, it is the unsafe condition, created by the cargo, which is felt to be a violation of some absolute duty of the shipowner. We recognize, of course, that a shipowner's duty is not to be evaded by calling a man a long-

[3] If there could be said to be any ambiguity in the record (which we doubt) it is clearly resolved by reading the entries as to similar occurrences at other hatches.

shoreman and placing him in someone else's employ. *Seas Shipping Co.* v. *Sieracki*, 1946, 328 U.S. 85. But while labels [fol. 170] cannot avoid liability, they should not be used to create it. This is not a case of a defective piece of ship's equipment, or of a dangerous condition aboard the ship. Nor is it a case of a claimant whose work carries him both on and off the vessel. At best, lading, which was not part of the ship, which did not make the ship unsafe, and which had left the ship, is being used to impose absolute liability upon the shipowner for a condition caused by the lading to a shore worker. Some may feel this gangway has been crossed. See, *e.g.*, *Hagans* v. *Ellerman & Bucknall S.S. Co.*, D.C.E.D.Pa., 1961, 196 F. Supp. 593; *Fitzmaurice* v. *Calmar S.S. Corp.*, D.C.E.D.Pa., 1961, 198 F. Supp. 304. But it seems to us that to extend such protection disregards the whole origin and purpose of the doctrine of unseaworthiness.[4] True, such a worker may be broadly argued to be in the service of the ship. But not even in a technical sense was he on or about to go "on a voyage." *Pope & Talbot, Inc.* v. *Hawn*, 1953, 346 U.S. 406, 413. His dangers were not the same. *Ibid.* We see no difference to a land employee in source, cause, risk, or effect between beans spilled on a dock, or on a trucking platform, or on a warehouse floor in Denver. The very fact that unseaworthiness obligations are "awesome," *Kott* v. *Shell Oil Co.*, 5 Cir., 1961, 286 F.2d 746, 752, suggests that they should not be handled with prodigality. We are unwilling to recognize one here.

A recent case somewhat close on the facts is *Partenweederei* v. *Weigel*, 9 Cir., February 1962, F.2d . There libelant was a dock worker engaged in driving a tractor [fol. 171] handling lumber on the dock which was about to

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[4] Singularly enough, the doctrine of absolute tort liability for injuries ashore, to the extent that there have been cases, seems to exist solely for the benefit of longshoremen. Whether those decisions represent the independent views of the courts concerned, or are merely thought to be required by those of the Supreme Court, may be problematical. *Cf. Robillard* v. *A.L. Burbank & Co.*, *supra*. But we know that on at least one occasion we ourselves have erroneously exaggerated those views. *New York, N.H. & H. R.R.* v. *Henagan*, 1 Cir., 1959, 272 F.2d 153, *rev'd.*, 1960, 364 U.S. 441.

be loaded onto respondent's vessel. He was struck by a defective ship's boom. The court found that libelant was not performing traditional ship's work within the scope of the obligation of seaworthiness. While the court noted a distinction between cargo not yet connected with the ship's loading gear and cargo actually being loaded, it is in common with us in recognizing limits in this area to principles of absolute liability. In a way the facts were more favorable to libelant than in the case at bar because it was the ship's gear that was defective and not merely cargo previously aboard.

There is a more specific difficulty. The court overruled the defense of laches because it found that libelant had a valid excuse for the delay and because respondent was not prejudiced. The only suggested excuse was that libelant consulted counsel within the statutory period. This has never been regarded as extenuation. *Wilson* v. *Northwest Marine Iron Works*, 9 Cir., 1954, 212 F.2d 510; *Marshall* v. *International Mercantile Marine Co.*, 2 Cir., 1930, 39 F.2d 551; *McGrath* v. *Panama R.R.*, 5 Cir., 1924, 298 Fed. 303. Assuming that absence of excuse is not fatal if there has been no actual prejudice, *but cf. Taylor* v. *Crain*, 3 Cir., 1952, 195 F.2d 163, we think that such lack of prejudice has been shown only in part. The court's first basis, that the witnesses were still available, was not equivalent to an opportunity to examine them at an earlier date. *Cf. Redman* v. *United Fruit Co.*, 2 Cir., 1949, 176 F.2d 713, *s.c.*, 2 Cir., 1950, 185 F.2d 553. It was demonstrated that the memories of these witnesses had become impaired. While they testified to loose beans falling from the drafts, they also testified similarly as to rice and feed. Yet defendant's records, of which the court quite properly made a point in another connection, showed that no rice or feed was discharged until after the accident. And while the records did in fact [fol. 172] show spilling from the drafts, they showed none near the hatch opposite which libelant was working. The testimony as to the defective-bag source of the beans on which libelant was found to have slipped is highly questionable. We think as to this portion of the claim it was error to find that respondent was not prejudiced by the delay.

There is a similar weakness with respect to the evidentiary proof. Libelant cannot recover for beans that spilled from the drafts without some affirmative showing that they were the ones upon which he slipped. With an admitted substantial source of a large quantity of beans—the dropped bag—it seems to us that any finding that libelant fell, instead, on beans which spilled from defective bags on the drafts would be entirely speculative.[5] For either of these reasons we could not recognize a finding that libelant's fall was so caused.

On the other hand, as to the dropped bag, we quite agree that since respondent's own records showed it, respondent was not prejudiced. This, however, does not help libelant. Even if it could be found that libelant slipped on beans from that source, there was no evidence that this bag was defective, or that any defect caused it to drop. For all that appears there may have been improper operation by the winchman. His negligence, as already stated, was not the responsibility of the respondent. Accordingly, there is no basis for supporting a finding for libelant on any theory. Respondent's motion for judgment should have been allowed.

Judgment will be entered vacating the decree of the District Court, and remanding the case to that Court with direction to dismiss the libel.

[fol. 173]

IN UNITED STATES COURT OF APPEALS

JUDGMENT—April 11, 1962

This cause came on to be heard on appeal from the United States District Court for the District of Puerto Rico, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The decree of the District

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[5] Strictly, it must be observed that the court's attributing libelant's fall to beans from defective bags appears to be based primarily on its mistaken finding that a bag broke in mid-air.

Court is vacated, and the case is remanded to that Court with direction to dismiss the libel.

By the Court: Roger A. Stinchfield.

Approved: Peter Woodbury, Ch. J.

[fol. 174] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 175]

SUPREME COURT OF THE UNITED STATES

No. 229—October Term, 1962

FEDERICO MARIN GUTIERREZ, Petitioner,

vs.

WATERMAN STEAMSHIP CORP.

ORDER ALLOWING CERTIORARI—October 8, 1962

The petition herein for a writ of certiorari to the United States Court of Appeals for the First Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Goldberg took no part in the consideration or decision of this petition.

In the
Supreme Court of the United States

OCTOBER TERM, 1962

No. 229

FEDERICO MARIN GUTIERREZ,
PETITIONER,

v.

WATERMAN STEAMSHIP CORP.,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

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INDEX

CASES CITED

Page

STATUTES

MISCELLANEOUS

In the
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RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES.

The petitioner, by his counsel, HARVEY B. NACHMAN, respectfully petitions this Honorable Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit, which reversed the decree in favor of petitioner and remanded the case to the District Court for the District of Puerto Rico with directions to dismiss the libel and in support of his petition does show:

1. The opinion of the United States Court of Appeals for the First Circuit has not been reported as of this date and is appended hereto at pages 24-29, *infra*. The opinion of the United States District Court for the District of Puerto Rico was not reported and appears in the certified record at pages 12 through 22.

2. The judgment of the United States Court of Appeals for the First Circuit vacating the judgment of the District Court of Puerto Rico and remanding with directions to enter a judgment of dismissal is dated April 11, 1962.

Jurisdiction

The jurisdiction of this Honorable Court to review by way of writ of certiorari is based on United States Code, Title 28, Sections 1254 (1) and 2101 (c) and Supreme Court Rules, Rule 19, Subsection 1(b).

Questions Presented

3. The questions presented for review are:

A. Is a shipowner liable for injuries suffered by a shore-based longshoreman, who was participating in the unloading operations of the ship at the time of injury?

This question comprises the subsidiary questions of (1) whether longshoremen engaged in a ship's service are entitled to the doctrine of unseaworthiness while working on shore as they are while working aboard; and, (2) whether liability of the shipowner extends to injuries occurring on shore proximately caused by unseaworthy cargo aboard or by its negligent discharge.

B. Does the shipowner's liability for negligence terminate at the edge of the pier?

Subsidiary issues comprised in this question include the foreseeability of injury to one not aboard the vessel; the responsibility of the shipowner for situations created ashore even though the area where the injury occurs is not within his power and control; and the scope and the extent of the shipowner's continuing duty to provide a safe place to work.

C. May laches be decreed as a complete bar to recovery, as a matter of law, if the trial court has found as a matter of fact that the respondent was not prejudiced by the delay?

D. Does the Court of Appeals have the power to reverse findings of fact based in whole or in part upon the credibility of the witnesses in an admiralty matter on its own independent reading of the record?

Necessarily contained in this question are the subsidiary questions of whether an appeal in admiralty is a trial *de novo* and whether a court of appeals has the right to reverse the district court's findings if not clearly erroneous and if supported by the evidence.

4. The constitutional provisions involved are:

United States Constitution, Article 3, Section 2:

> "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority:—to all Cases affecting Ambassadors,

other public Ministers and Consuls; — to all Cases of admiralty and maritime Jurisdiction; — to Controversies to which the United States shall be a Party; — to Controversies between two or more States; — between a State and Citizens of another State; — between Citizens of different States; — between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."

The statutes involved are:

Public Law 695 of June 19, 1948 (c) 506, 62 Stat. 496; 46 U.S. Code, Section 740:

"The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land.

In any such case suit may be brought in rem or in personam according to the principles of law and the rules of practice obtaining in cases where the injury or damage has been done and consummated on navigable water: *Provided*, That as to any suit against the United States for damage or injury done or consummated on land by a vessel on navigable waters, the Public Vessels Act or Suits in Admiralty Act, as appropriate, shall constitute the exclusive remedy for all causes of action arising after June 19, 1948, and for all causes of action where suit has not been hitherto filed under the Federal Tort Claims Act: *Provided*

further, That no suit shall be filed against the United States until there shall have expired a period of six months after the claim has been presented in writing to the Federal agency owning or operating the vessel causing the injury or damage."

Laws of Puerto Rico Annotated, Title 11, Section 32:

"In cases where the injury, the occupational disease, or the death, entitling the workman or employee, or his beneficiaries, to compensation in accordance with this chapter, has been caused under circumstances making third parties liable for such injury, disease or death, the injured workman or employee or his beneficiaries may claim and recover damages from the third party liable for said injury, disease, or death, within one year following the date when becomes final the decision of the case by the Manager of the State Insurance Fund, who may subrogate himself in the rights of the workman or employee or his beneficiaries to institute the same action in the following manner:

"When an injured workman or employee, or his beneficiaries in case of death, may be entitled to institute an action for damages against a third person in cases where the State Insurance Fund, in accordance with the terms of this chapter, is obliged to compensate in any manner or to furnish treatment, the Manager of the State Insurance Fund shall subrogate himself in the rights of the workman or employee or of his beneficiaries, and may institute proceedings against such third person in the name of the injured workman or

employee, or of his beneficiaries, within the ninety (90) days following the date on which the decision of the case becomes final and executory, and any sum which as a result of the action, or by virtue of a judicial or extrajudicial compromise, may be obtained in excess of the expenses incurred in the case, shall be delivered to the injured workman or employee or to his beneficiaries entitled thereto. The workman or employee or his beneficiaries shall be parties in every proceeding instituted by the Manager under the provisions of this section, and it shall be the duty of the Manager to serve written notice on them of such proceedings within five (5) days after the action is instituted.

"If the Manager should fail to institute action against the third party liable, as set forth in the preceding paragraph, the workman or employee, or his beneficiaries, shall be fully at liberty to institute such action in their behalf, without being obliged to reimburse the State Insurance Fund for the expenses incurred in the case.

"Neither the injured workman or employee, nor his beneficiaries, may institute any action or compromise any cause of action they may have against the third party liable for the damages, until after the lapse of ninety days from the date on which the decision of the case by the Manager of the State Insurance Fund became final and executory.

"No compromise between the injured workman or employee, or his beneficiaries in case of death, and the third party liable, made within the ninety (90) days following the date on which the decision of the case becomes final and executory, or after the lapse of said term if the Manager has filed his complaint, shall be valid or effective in law un-

less the expenses incurred by the State Insurance Fund in the case are first paid; and no judgment shall be entered in suits of this nature, nor shall any compromise whatsoever as to the rights of the parties to said suits shall be approved, without making express reserve of the right of the State Insurance Fund to reimbursement of all expenses incurred; *Provided*, That the secretary of the court part taking cognizance of any claim of the nature described above shall notify the Manager of the State Insurance Fund any order entered by the court which affects the rights of the parties to the case, as well as the final disposition of said case.

"The Manager of the State Insurance Fund may, with the approval of the Secretary of Labor of Puerto Rico, compromise as to his rights against a third party liable for the damages; *It being understood, however*, That no extrajudicial compromise shall impair the rights of the workman or employee, or of his beneficiaries, without their express consent and approval.

"Any sum obtained by the Manager of the State Insurance Fund through the means provided in this section shall be covered into the State Insurance Fund for the benefit of the particular group into which was classified the occupation or the industry in which the injured or dead workman or employee was employed.—Amended June 15, 1955, No. 76, p. 258, § 2, eff. June 15, 1955."

Statement of the Case

On October 21, 1956, Federico Marín Gutierrez, a longshoreman employed by an independent stevedoring con-

tractor, was injured when he fell on the apron of the pier in Ponce, Puerto Rico, during the course of the unloading of the SS HASTINGS, a vessel owned and operated by the respondent.

The petitioner's duties were performed entirely on shore and he never went aboard the vessel. Prior to his injury, the vessel had discharged torn bags of beans, whose contents were spilled on the apron of the pier. Petitioner, engaged in the discharging operation, slipped on some of the spillage, fell and injured his back. The spillage had been observed while the bags were in midair on drafts attached to the ship's discharging equipment. (R. 23, 76, 77, 78, 152; Exhibit 10, 156 through 164).

Suit was filed in the United States District Court for the Southern District of New York on January 9, 1959. Under the analogous statute of limitations, 11 L.P.R.A. 32, the time to file would have expired on November 30, 1957. The libel specifically pleaded that laches did not apply because of excusable delay and absence of prejudice to the respondent. (R. 6 through 7).

The trial commenced on March 21, 1960. During the pendency of the action, prior to trial, the respondent caused the deposition of the petitioner to be taken and served interrogatories upon the petitioner, which were answered. In the deposition and in the answers to the interrogatories, the petitioner gave the names and addresses of the eye-witnesses but the respondent made no effort to contact the witnesses prior to trial. (R. 151 and 153). The records also indicated the eye-witnesses. (R. 132, 135).

At the conclusion of the trial, the Court stated:

> "Of course, I should advance to counsel, I believe that on the question of unseaworthiness and/or negligence, the libelant has made a case, that as regards the question of laches the libelant has shown sufficient

excuse for the delay, and that the only two questions with which the Court is really concerned are the question of the actual physical damage suffered by libelant as a consequence of the October 21, 1956 accident. Whether his present physical state is totally the result of that accident, or whether the accident aggravated in some way his physical state resulting from the 1951 accident, or whether the 1959 accident aggravated and to what extent the previous physical condition of the libelant.

"I believe that in order to decide that, it is indispensable that the parties get a transcript of the medical testimony in the case, particularly I want to read pretty carefully the testimony of the two main experts, Dr. Rifkinson and Dr. Ramirez de Arellano. Of course, I have no doubt that part of the present condition of the libelant is due to the 1956 accident, but to what extent, and that's the important thing, in order to determine the damages.

"I believe as to the material aspect of the damages I want the parties to discuss that more or less what appears from the evidence as to actual earnings of this libelant, if there is any evidence as to it, because the evidence is very weak in that. That's all I need.

"I believe it isn't necessary to file briefs or discuss the exceptive allegations, and I had the opinion that it would have been factual and unnecessary to discuss those exceptive allegations. They are based precisely on what transpired at the trial. They stand or fall on the evidence offered here, so it is not necessary to make a separate discussion of that. Indeed, I believe that what I have said now disposes of the exceptive allegations." (R. 153-154).

Thereafter, the District Judge filed his opinion, findings of fact and conclusions of law. A specific finding was made that beans had been observed spilling from the drafts that were discharged from the vessel throughout the unloading operation. (R. 18). Another finding was made that the beans scattered about the surface of the pier created a dangerous condition for the longshoreman. (R. 18). It was also found that the cargo being discharged was defective and unseaworthy and that the shipowner was negligent in permitting the broken bags to be discharged and in failing to furnish libellant with a safe place to work. (R. 18-19).

The District Court also found that the respondent had suffered no prejudice as a result of the delay in bringing the action since the payroll records of the stevedoring contractor, produced at the trial by respondent, indicated who were the potential witnesses, all of whom were present at the trial and the respondent itself produced records indicating the cargo damage prior to and at the time of discharge and that medical evidence, including the treating physicians, was also available to respondent. (R. 19).

The United States Court of Appeals for the First Circuit, in reversing, ruled that petitioner as a shore worker was not entitled to the doctrine of unseaworthiness since he was, "not even in a technical sense . . . about to go 'on a voyage' ". (R. 27).

Without any concomitant holding that petitioner was not performing work traditionally performed by seamen or that petitioner was not in the service of the vessel, the Court then held, contrary to the conclusions of the District Court, that respondent was not liable under the doctrine of negligence inasmuch it had neither control of nor even a right to control the place where the accident occurred. (R. 26).

The Court of Appeals also held that the action was barred by laches despite the specific finding by the trial Court that

respondent had suffered no prejudice as a result of the delay.

In its opinion, the Court of Appeals admitted that its holding was in conflict with rulings rendered by several district courts but made no reference to contrary decisions of the courts of appeals of other circuits which had been cited to it by both petitioner and respondent.

Argument

A. In Deciding That a Longshoreman Injured on the Pier During the Discharge of Cargo From a Vessel Is Not Entitled to the Same Protection as a Longshoreman Injured Aboard the Vessel, the Court of Appeals for the First Circuit Has Decided an Important Question of Federal Admiralty and Maritime Law That Is Irreconcilable With a Statute of Congress, Authoritative Decisions on This Court and Decisions of at Least Five Other Courts of Appeals.

I. *Unseaworthiness*

In *Seas Shipping Co.* v. *Sieracki*, (1946), 328 U.S. 85, 66 S. Ct. 872, 90 L. Ed. 1099, this Court extended the humanitarian doctrine of unseaworthiness to longshoremen performing ship's service, which until recent times had been performed by members of the crew. The precise question of whether the same policy applied to longshoremen injured ashore was anticipated and left open in a footnote to the majority opinion:

> "In this case we are not concerned with the question whether the same policy extends to injuries incurred ashore by a stevedore engaged in the same

work, a matter which is relevant however in Swanson v. Marra Brothers, Inc. No. 405, 328 U.S. 1, 66 S. Ct 869, Cf. O'Donnell v. Great Lakes Dredge & Dock Co., 318 U.S. 36, 63 S. Ct. 488, 87 L. Ed. 596."

328 U.S. 85 at p. 100; 66 S. Ct. 869 at p. 880.

Prior to the decision below three other Courts of Appeals did decide the question, and each of them answered it exactly opposite to the way in which it was answered by the Court of Appeals for the First Circuit.

Strika v. *Netherlands Ministry of Traffic*, 2 Cir. 1950, 185 F 2d 555; cert. denied, (1951) 341 U.S. 904, 71 S. Ct. 614, 95 L. Ed. 1343.

Pope & Talbot, Inc. v. *Cordray*, 9 Cir. 1958, 258 F 2d 214.[1]

American Export Lines, Inc. v. *Revel*, 4 Cir. 1959, 266 F 2d 82.

The bench and bar apparently have interpreted this Court's denial of certiorari in the *Strika* case as an affirmative answer to the question left open by the footnote quoted above from *Sieracki* because when a case involving an injured shore-based longshoreman arose in the Court of Appeals for the Third Circuit, neither the lawyers nor the Court raised any question about the longshoreman's right to recover.

Hagans v. *Farrell Lines, Inc.*, 3 Cir. 1956, 237 F 2d 477.

[1] The longshoreman's duties in this case were primarily ashore but he was injured aboard. The Court stated: "We hold that the duty of providing a seaworthy ship and gear at the time of this accident extended to the appellee, whether or not appellee was on board the ship or on the dock." 258 F 2d 214, 218.

None of the Courts of Appeals have ever questioned that the discharge of cargo was historically the work of seamen. Indeed, there would be no reason to question that proposition.[2]

In *Strika*, Judge Learned Hand, synthesized the three opinions of this Court referred to in the quotation at the outset of this argument.

> *Seas Shipping Co.* v. *Sieracki*, (1946), 328 U.S. 80, 66 S. Ct. 872, 90 L. Ed. 1099;
>
> *Swanson* v. *Marra Brothers, Inc.*, (1946), 328 U.S. 1, 66 S. Ct. 869, 90 L. Ed. 1045;
>
> *O'Donnell* v. *Great Lakes Dredge and Dock Co.*, (1943), 318 U.S. 36, 63 S. Ct. 488, 87 L. Ed. 596.

O'Donnell held that a seaman injured ashore in the course of his employment could recover against his employer, the shipowner, under the Jones Act, 46 U.S.C.A. 688; *Swanson*, however, held that a longshoreman injured ashore could not recover against his employer, the stevedore, under the same statute, because Congress had limited the remedy against the stevedore-employer exclusively to compensation. 33 U.S.C.A. 901, *et seq.* But, on the same day that this Court decided *Swanson*, it also decided *Sieracki*, in which the doctrine of unseaworthiness was extended to longshoremen in actions against the shipowner as a third party.

From the teachings of these decisions, Judge Hand concluded that a longshoreman injured ashore (as was the seaman *O'Donnell*) could recover for unseaworthiness against the shipowner (as could the longshoreman *Sieracki*). Judge

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[2] Jacobsen, *Laws of the Sea* (1819); *Dixon* v. *The Cyrus*, (D. Pa., 1789) 7 Fed. Cas. 755, Case No. 3,930; *Cloutman* v. *Tunison* (Cir. Court, D. Mass., 1833), 5 Fed. Cas. 1091; *The Hudson*, (W.D. Pa., 1881) 6 Fed. 830; *The Circassion*, 1 Ben. 209, Fed. Cas. No. 2,722 (1867); *Gilbert Knapp*, 37 Fed. 209 (1889).

Swan dissented solely because he felt that any extension of the doctrine of unseaworthiness to shore-based longshoremen should be decided only by this Court. Despite that dissent this Court refused to review.

341 U.S. 904, 71 S. Ct. 614, 95 L. Ed. 1343.

Between the date of the accident of *Strika* and the decision of the Court of Appeals, Congress enacted the Extension of Admiralty and Maritime Jurisdiction Act, 46 U.S.C.A. 740. Judge Hand felt that in all cases that arose after the enactment of that statute, the question had probably been foreclosed because of Congressional Action—and it may be for that reason that certiorari was denied.

Despite the decision of the Court of Appeals for the Second Circuit and the acceptance of this reasoning by the Courts of Appeals for the Fourth and Ninth Circuits, the Court of Appeals for the First Circuit has taken an irreconcilable position. In so doing it ignored the Act of Congress, which was cited by the District Court and fully briefed on appeal.

Recognizing decisions to the contrary (but only District Court cases), the Court below refused to "cross the gangway". By its decision the Boston Court has destroyed the uniformity of the admiralty and maritime law that heretofore had been accepted by the lower federal courts, all of which had recognized the longshoreman's right to recover for injuries sustained ashore.[3]

[3] The two cases cited by the Court of Appeals are inapposite. In *Partenweederei MS Belgran* v. *Weigel*, 9 Cir., 1962, 299 F. 2d 897, the Court found that the libellant, tractor-driver, was not engaged in the type of work traditionally done by seamen, distinguishing *Pope & Talbot* v. *Cordray*, 9 Cir., 1958, 258 F. 2d 214. In *Kent* v. *Shell Oil Company*, 5 Cir. 1961, 286 F. 2d 746, recovery was denied because the injury was caused by a thing which was not a part of a vessel or its appurtenances. In a footnote, the Court of Appeals for the Fifth Circuit stated: "We do not reach this problem specifically and we ex-

Valerio v. *American President Lines*, D.C.S.D.N.Y. 1952, 112 F. Supp. 202.

Litwinowicz v. *Weyerhaeuser S.S. Co.*, D.C.E.D. Pa. 1959, 179 F. Supp. 812.

Di Salvo v. *Cunard S.S. Co.*, D.C.S.D.N.Y. 1959, 171 F. Supp. 813.

Robillard v. *A. L. Burbank & Co., Ltd.*, D.C.S.D.N.Y. 1960, 186 F. Supp. 193.

Hagans v. *Ellerman & Bucknall Steamship Co.*, D.C. E.D. Pa. 1961, 196 F. Supp. 593.

Fisher v. *United States Lines Company*, D.C.E.D. Pa. 1961, 198 F. Supp. 815.

Language in the Court below may also be interpreted to mean that the Court of Appeals for the First Circuit does not believe that the broken condition of the bags of cargo rendered the vessel unseaworthy. If this be the case, the decision below is in direct conflict with authoritative decisions of this Court and decisions of the Courts of Appeals for the Second and Third Circuits.

Ryan-Stevedoring Co., Inc. v. *Pan Atlantic Steamship Corp.*, 1956, 350 U.S. 124, 76 S. Ct. 232, 100 L. Ed. 133.

Amador v. *A/S J. Ludwig Mowinckels Rederi*, 2 Cir. 1955, 224 F. 2d 437, certiorari denied, 350 U.S. 901, 76 S. Ct. 179, 100 L. Ed. 791.

Gindville v. *American Hawaiian Steamship Company*, 3 Cir. 1955, 224 F. 2d 746.

Curtiss v. *A. Garcia Y Cia.*, 3 Cir. 1957, 241 F. 2d 30.

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press no opinion on our ultimate determination whether *Strika* v. *Netherlands Ministry of Traffic*, 2 Cir., 1950, 185 F 2d 555, certiorari denied, 341 U.S. 904, 71 S.Ct. 614, 95 L. Ed. 1343, is correct. See also *Pope & Talbot, Inc.* v. *Cordray*, 9 Cir., 1958, 258 F 2d 214; and *Valerio* v. *American President Lines*, D.C.S.D.N.Y. 1952, 112 F. Supp. 202." 286 F 2d 746. Footnote 14 at page 752.

Reddick v. *McAllister Lighterage Line*, 2 Cir. 1958, 258 F. 2d 297.

Rich v. *Ellerman & Bucknall SS Co.*, 2 Cir. 1960, 278 F. 2d 704.

Some of the District Court cases previously cited involved the same combination of factors as did the instant case—unseaworthy cargo and shore-side injuries. All District Judges (including the District of Puerto Rico) relying on the same authorities granted recovery.

Valerio v. *American President Lines*, D.C.S.D.N.Y. 1952, 112 F. Supp. 202.

Robillard v. *A. L. Burbank & Co., Ltd.*, S.D.N.Y. 1960, 186 F. Supp. 193.

Hagans v. *Ellerman & Bucknall Steamship Co.*, D.C. E.D. Pa. 1961, 196 F. Supp. 593.

It is for this Court to now resolve the conflict and confusion created by the decision below.

II. *Negligence*

In addition to reaching fact conclusions different from those reached by the District Court, the Court below reversed the decree insofar as it was based on negligence because the shipowner did not control the situs of the injury. This proposition of law not only vitiates the Extension of Admiralty and Maritime Jurisdiction Act but it is also incompatible with the authority as expressed by this Court and other Courts of Appeals.

The duty of the shipowner heretofore was not only to provide and maintain a seaworthy vessel; he had also to provide a safe place to work and to refrain from injuring one by negligent conduct. Recently, this Court defined the

duty of the shipowner as "exercising reasonable care under the circumstances of each case."

Kermarec v. *Compagnie Generale Transatlantique*, 1959, 358 U.S. 625, 79 S. Ct. 406, 3 L. Ed. 2d 550.

That case had to do with a shipboard accident. We may assume that if the decision below is the law, the shipowner need not exercise reasonable care as long as the injured person is injured ashore. But to make the assumption that the decision below is the law, we would have to overturn decisions from other circuits to the contrary.

The Court of Appeals for the Sixth Circuit has held that the failure to post a watchman on board constituted negligence and the resulting injury to the shore-based longshoreman was compensable.

Imperial Oil Limited v. *Drlik*, 6 Cir. 1956, 234 F. 2d 4.

The Court of Appeals for the Third Circuit has held that a shipowner may be liable for negligence in permitting dangerous methods of discharge.

Beard v. *Ellerman Lines, Ltd.*, 3 Cir. 1961, 289 F. 2d 201.

Again, this too, was a shipboard accident. But the decision by that Court and the instant one cannot be harmonized. If the risk defines the duty to be obeyed, the injury to the shore-based longshoreman is just as much within the specific risks of the dangerous discharge methods tolerated by the owner, as is the injury to longshoreman aboard.[4]

[4] Relying on the *Beard* case, in a fact situation similar to the case at bar, a District Court found that the shipowner had provided an unseaworthy vessel, was negligent in permitting a dangerous method of discharge and in failing to provide a safe place to work. *Hagans* v. *Ellerman & Bucknall Steamship Co.*, D.C., E.D. Pa. 1961, 196 F. Supp. 593.

The Court of Appeals for the Second Circuit has ruled that a condition created on the pier by the negligent discharge of cargo is compensable if a seaman is injured even though the shipowner did not control the pier.

Marceau v. *Great Lakes Transit Corporation*, 2 Cir. 1945, 146 F. 2d 416.

Substituting the petitioner for the seaman, *Marceau*, under the teaching of either *Sieracki* or *Kermarec*, petitioner would be entitled to recover. The conflict created between the Courts of Appeals for the First and Second Circuits by the decision below should be resolved by this Court.

B. In Deciding That the Petitioner's Claim Was Barred by Laches, the Court of Appeals for the First Circuit Has Decided a Question of Federal Maritime Law Directly in Conflict With the Authoritative Decisions of This Court, and the Decisions of Other Courts of Appeals.

In *Gardner* v. *Panama R. Co.* (1951) 342 U.S. 29, 72 S. Ct. 12, 96 L. Ed. 31, this Court stated:

> "Although the existence of laches is a question primarily addressed to the discretion of the trial court, the matter should not be determined merely by a reference to and a mechanical application of the statute of limitations. The equities of the parties must be considered as well. Where there has been no inexcusable delay in seeking a remedy and where no prejudice to the defendant has ensued from the mere passage of time, there should be no bar to relief."

342 U.S. at page 30-31, 72 S. Ct. at page 13.

The trial judge did not apply the statute of limitations[5] mechanically. He determined that there was both excusable delay and that the respondent was not prejudiced. The Court of Appeals disagreed and said that laches barred the action.

The delay in this case was two years, two months and nineteen days from the date of the occurrence.[6] At the trial, eye-witnesses and doctors testified and certain documentary evidence was presented. The respondent introduced an accident report and payroll records which disclosed that the only potential eye-witnesses were the ones actually produced by petitioner. In a deposition and in answers to interrogatories the names and addresses were furnished. Not once in the sixteen months between the filing of the libel and the trial was any attempt made by the respondent to contact these witnesses or to find out what happened. Their testimony was believed by the Trial Court.

In addition to these witnesses there were statements and medical records of the State Insurance Fund. The respondent itself introduced all the records proving that the cargo was damaged prior to and during discharge. Respondent obtained a physical examination of petitioner and produced expert witnesses.

The ruling of the Court of Appeals on this issue disregards the pronouncements of this Court and conflicts with decisions in other circuits.

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[5] 11 L.P.R.A. 32.

[6] Analogous statutes of limitations for unseaworthiness are usually longer. Sometimes they are as much as six (6) years. *Le Gate* v. *The Panamolga*, 2 Cir., 1950, 221 F. 2d 689.

The Jones Act, 46 U.S.C.A. 688, has a three (3) year statute of limitations. The discussion by this Court of the application of that statute in a negligence action combined with one for unseaworthiness is illuminating. *McAllister* v. *Magnolia Petroleum Co.*, 357 U.S. 221, 78 S. Ct. 1201, 2 L. Ed. 2d 1272.

Claussen v. *Mene Grande Oil Co.*, 3 Cir. 1960, 275 F. 2d 108.
Vega v. *The Malula*, 5 Cir. 1961, 291 F. 2d 415.

What the Court of Appeals for the Fifth Circuit said in the latter case is pertinent here:

> "What it (the respondent) knows is of no real help. But on this record there is no indication that if it could learn more, it could extricate itself from the inexorable consequences of the American Maritime concept of seaworthiness.
>
> 291 F. 2d at page 420.

The reasoning of the Appellate Court in the instant case would make it impossible to ever apply the equitable doctrine of laches. Unlike the Court of Appeals for the Fifth Circuit, it is willing to mechanically apply limitations to cut off the "awesome consequences" of unseaworthiness.[7] A principle of admiralty law firmly established by this Court eleven years ago has been eroded. The standard in the First Circuit is not the same as in other Courts. A doctrine, the purpose of which was the mitigation of the harsh mechanical application of statutes of limitation, has been perverted to serve as a bar to recovery in an action which in many jurisdictions would not even be barred by limitations.

[7] The dissatisfaction of the Court below with that doctrine was clearly expressed in *Mitchell* v. *Trawler Racer, Inc.*, 1 Cir., 1959, 265 F. 2d 426, reversed (1960), 362 U.S. 539, 80 S. Ct. 926, 4 L. Ed. 2d 941.

C. The Court of Appeals for the First Circuit Has Violated the Standard Set by This Court in Reviewing Findings of the District Court Sitting Without a Jury in Admiralty.

The findings of the District Court may not be set aside unless clearly erroneous.

McAllister v. *United States* (1954) 348 U.S. 19, 75 S. Ct. 6, 99 L. Ed. 20.

In this particular case more than most, this doctrine warrants respect. The witnesses testified in Spanish, a language in which the trial judge is fluent. The opportunity to judge credibility and the importance of demeanor evidence is unique. Nevertheless, from an independent reading of the cold, translated record, the Court of Appeals made independent findings of fact, reversed findings of fact of the trial court which resolved conflicts in the evidence, and determined the weight to be given to exhibits as against testimonial evidence.

The Court below pointedly emphasizes that a bag of beans which the trial court found broke open in mid-air actually broke open upon hitting the dock after a fall from mid-air. Then the Court of Appeals incurs in an error of fact by finding that no conduct in which respondent participated was responsible for the beans on the dock, completely ignoring a specific finding of the trial court and testimony by all of the fact witnesses to the effect that beans were spilling from drafts of broken bags throughout the unloading operations, and corroboration in respondent's Exhibit 10 showing broken bagged cargo.

As a basis for reversal, the Court of Appeals also relies on a prior statement of libelant, allegedly inconsistent with his testimony on trial. In so doing, the Court disregards

the cross-examination to which petitioner was submitted (R. 37-38) in the presence of the trial court and which apparently clarified any inconsistency to the satisfaction of that court, and also disregards the uncontradicted and unimpeached testimony of all the other fact witnesses.

Continuing this apparent trial *de novo*, the appellate court finds that the memories of the witnesses had become impaired because they testified that rice and feed had also spilled from drafts, while respondent's records showed no rice or feed being discharged until after petitioner's accident. The witnesses stated the accident occurred in the afternoon. Respondent's Exhibit 2 indicated the accident occurred in the morning. Not only does the Court of Appeals vitiate the trial court's prerogative of determining the weight to be given to any particular evidence, and the comparative weight of testimonial as against documentary evidence, but it also substitutes the appellate court's conclusion for that of the trial court on a disputed issue.

The Court of Appeals even goes so far as to make a finding of fact contrary to both the testimonial and documentary evidence in the record. The Court states:

> "And while the records did in fact show spilling from the drafts, they showed none near the hatch opposite which libelant was working."

The Court below disregarded the testimony of the witnesses. In this respect it also disregarded respondent's documentary evidence (Exhibit 10) which shows broken bags in all hatches of the vessel except number 5. Petitioner was working opposite number 2.

Once again, as in *Guzman* v. *Pichirilo*, decided by this Court on May 21, 1962 (No. 358, October Term, 1961), the Court of Appeals for the First Circuit has departed from

the standard established by *McAllister* v. *United States*, *supra*, and has reversed findings of fact made by the District Court for the District of Puerto Rico. Those findings were based on substantial evidence and some on uncontroverted evidence. The reversal can be sustained only if the findings were error as a matter of law. In so holding, the Court of Appeals is in direct conflict with the decisions of every other Court of Appeals and District Court that has ruled on the issues of law presented in this case.

Although it may not be the function of this Court to correct mere error by way of certiorari, nevertheless, when a lower court has so openly departed from the judicial standards established and repeatedly invoked by this Court, an exercise of the power of supervision is called for to maintain uniformity and authority in the law.

Conclusion

For the foregoing reasons, it is respectfully submitted that this Honorable Court issue a writ of certiorari to the United States Court of Appeals for the First Circuit in this cause and that this Court should review and reverse the decision of the Court of Appeals and reinstate the decree of the United States District Court for the District of Puerto Rico.

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Appendix

United States Court of Appeals

For the First Circuit

No. 5887.

WATERMAN STEAMSHIP CORP.,

RESPONDENT, APPELLANT,

v.

FEDERICO MARIN GUTIERREZ,

LIBELANT, APPELLEE.

[193 F. Supp. 894]

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF PUERTO RICO

Before MAGRUDER*, ALDRICH and SMITH*,

Circuit Judges.

Antonio M. Bird, with whom *Hartzell, Fernandez & Novas* was on brief, for appellant.

Harvey B. Nachman, with whom *Nachman & Feldstein* was on brief, for appellee.

OPINION OF THE COURT.

April 11, 1962.

ALDRICH, *Circuit Judge*. This is a libel by a longshoreman for personal injuries sustained on a dock at which respondent's vessel was unloading, allegedly by reason of "improper storage of cargo on said dock." In addition, there were general allegations of unseaworthiness of the vessel and of negligence of its master, officers and crew. The district court made findings in libelant's favor as to

*Sitting by assignment.

unseaworthiness and negligence and assessed damages. It rejected a defense of laches. Respondent appeals.

The accident occurred on October 21, 1956. Libelant was in the employ of a stevedore unloading respondent's vessel pursuant to contract. The first notice respondent received of the claim and, for all that appears, of the injury[1] was when suit was brought on January 9, 1959. By this date more than twice the period of the analogous statute of limitations had elapsed. The court found, "While working on the dock libelant slipped on [some] beans, twisted his torso and fell upon his buttocks. The injuries sustained by libelant were proximately caused by this unseaworthiness[2] of the vessel, the failure to furnish libelant with a safe place to work and by the negligence of the respondent." With respect to laches the court found that libelant had shown a sufficient excuse by the fact that he consulted counsel within the statutory period, and concluded that respondent was not prejudiced by the delay because the witnesses remained available and respondent had its own "records indicating the cargo damage."

The first question is the responsibility for the beans. The court found that many of the bean bags were defective, that coopers were employed in sewing them up; that nonetheless beans were spilled from the drafts as they were being swung ashore. "On one occasion, according to the records produced by respondent and admitted into evidence, a bag broke open in mid-air spilling its contents all over the dock. This event occurred while a draft from Hold No. 1 was in mid-air and still attached to the vessel. Hold No. 1 is immediately adjacent to No. 2 forward. Beans scattered

[1] Even libelant's employer had no prior notice of the basis of the present claim. Libelant told the State Insurance Fund not that he slipped, as now alleged, but that he fell because he was carried by the sling due to improper action of the winchman.

[2] What was meant by "this unseaworthiness" will be later discussed.

about the surface of the pier caused a dangerous condition for the longshoreman. The cargo being discharged was defective and unseaworthy. The ship owner was negligent in permitting the broken and weakened bags to be discharged, when it knew or should have known that injury was likely to result to persons in the service of the ship who had to work on and about the spilled beans. The condition on the pier was caused by the respondent's unseaworthy cargo and its lack of care. In permitting this condition to remain existent, the respondent failed to furnish libelant with a safe place to work."

The quoted portion of the court's opinion contains several errors. In the first place, the respondent's records do not show that the bag broke open in mid-air, but show that it fell from mid-air, and broke when it hit the deck.[3] Secondly, the bag fell, and beans were spilled, whether from there or anywhere else, by no conduct in which respondent was shown to have participated. *Cf. Robillard v. A. L. Burbank & Co.*, D.C.S.D.N.Y., 1960, 186 F. Supp. 193, 197. And it is undisputed, with respect to "permitting this condition to remain existent" on the pier, that respondent had neither control of nor even a right to control that locus. The court's findings as to respondent's negligence cannot stand.

There remains the finding of unseaworthiness of the cargo. One speaks of unseaworthy cargo really in terms of result: rather, it is the unsafe condition, created by the cargo, which is felt to be a violation of some absolute duty of the shipowner. We recognize, of course, that a shipowner's duty is not to be evaded by calling a man a longshoreman and placing him in someone else's employ. *Seas Shipping Co.* v. *Sieracki*, 1946, 328 U.S. 85. But while

[3] If there could be said to be any ambiguity in the record (which we doubt) it is clearly resolved by reading the entries as to similar occurrences at other hatches.

labels cannot avoid liability, they should not be used to create it. This is not a case of a defective piece of ship's equipment, or of a dangerous condition aboard the ship. Nor is it a case of a claimant whose work carries him both on and off the vessel. At best, lading, which was not part of the ship, which did not make the ship unsafe, and which had left the ship, is being used to impose absolute liability upon the shipowner for a condition caused by the lading to a shore worker. Some may feel this gangway has been crossed. See, *e.g.*, *Hagans* v. *Ellerman & Bucknall S.S. Co.*, D.C.E.D.Pa., 1961, 196 F. Supp. 593; *Fitzmaurice* v. *Calmar S.S. Corp.*, D.C.E.D.Pa., 1961, 198 F. Supp. 304. But it seems to us that to extend such protection disregards the whole origin and purpose of the doctrine of unseaworthiness.[4] True, such a worker may be broadly argued to be in the service of the ship. But not even in a technical sense was he on or about to go "on a voyage." *Pope & Talbot, Inc.* v. *Hawn*, 1953, 346 U.S. 406, 413. His dangers were not the same. *Ibid.* We see no difference to a land employee in source, cause, risk, or effect between beans spilled on a dock, or on a trucking platform, or on a warehouse floor in Denver. The very fact that unseaworthiness obligations are "awesome," *Kent* v. *Shell Oil Co.*, 5 Cir., 1961, 286 F.2d 746, 752, suggests that they should not be handled with prodigality. We are unwilling to recognize one here.

A recent case somewhat close on the facts is *Partenweederei* v. *Weigel*, 9 Cir., February 1962, F.2d . There libelant was a dock worker engaged in driving a tractor

[4] Singularly enough, the doctrine of absolute tort liability for injuries ashore, to the extent that there have been cases, seems to exist solely for the benefit of longshoremen. Whether those decisions represent the independent views of the courts concerned, or are merely thought to be required by those of the Supreme Court, may be problematical. *Cf. Robillard* v. *A. L. Burbank & Co.*, *supra*. But we know that on at least one occasion we ourselves have erroneously exaggerated those views. *New York, N.H. & H. R.R.* v. *Henagan*, 1 Cir., 1959, 272 F.2d 153, *rev'd*, 1960, 364 U.S. 441.

handling lumber on the dock which was about to be loaded onto respondent's vessel. He was struck by a defective ship's boom. The court found that libelant was not performing traditional ship's work within the scope of the obligation of seaworthiness. While the court noted a distinction between cargo not yet connected with the ship's loading gear and cargo actually being loaded, it is in common with us in recognizing limits in this area to principles of absolute liability. In a way the facts were more favorable to libelant than in the case at bar because it was the ship's gear that was defective and not merely cargo previously aboard.

There is a more specific difficulty. The court overruled the defense of laches because it found that libelant had a valid excuse for the delay and because respondent was not prejudiced. The only suggested excuse was that libelant consulted counsel within the statutory period. This has never been regarded as extenuation. *Wilson* v. *Northwest Marine Iron Works*, 9 Cir., 1954, 212 F.2d 510; *Marshall* v. *International Mercantile Marine Co.*, 2 Cir., 1930, 39 F.2d 551; *McGrath* v. *Panama R.R.*, 5 Cir., 1924, 298 Fed. 303. Assuming that absence of excuse is not fatal if there has been no actual prejudice, *but cf. Taylor* v. *Crain*, 3 Cir., 1952, 195 F.2d 163, we think that such lack of prejudice has been shown only in part. The court's first basis, that the witnesses were still available, was not equivalent to an opportunity to examine them at an earlier date. *Cf. Redman* v. *United Fruit Co.*, 2 Cir., 1949, 176 F.2d 713, *s.c.*, 2 Cir., 1950, 185 F.2d 553. It was demonstrated that the memories of these witnesses had become impaired. While they testified to loose beans falling from the drafts, they also testified similarly as to rice and feed. Yet defendant's records, of which the court quite properly made a point in another connection, showed that no rice or feed was discharged until after the accident. And while the records did in fact

show spilling from the drafts, they showed none near the hatch opposite which libelant was working. The testimony as to the defective-bag source of the beans on which libelant was found to have slipped is highly questionable. We think as to this portion of the claim it was error to find that respondent was not prejudiced by the delay.

There is a similar weakness with respect to the evidentiary proof. Libelant cannot recover for beans that spilled from the drafts without some affirmative showing that they were the ones upon which he slipped. With an admitted substantial source of a large quantity of beans—the dropped bag—it seems to us that any finding that libelant fell, instead, on beans which spilled from defective bags on the drafts would be entirely speculative.[5] For either of these reasons we could not recognize a finding that libelant's fall was so caused.

On the other hand, as to the dropped bag, we quite agree that since respondent's own records showed it, respondent was not prejudiced. This, however, does not help libelant. Even if it could be found that libelant slipped on beans from that source, there was no evidence that this bag was defective, or that any defect caused it to drop. For all that appears there may have been improper operation by the winchman. His negligence, as already stated, was not the responsibility of the respondent. Accordingly, there is no basis for supporting a finding for libelant on any theory. Respondent's motion for judgment should have been allowed.

Judgment will be entered vacating the decree of the District Court, and remanding the case to that Court with direction to dismiss the libel.

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[5] Strictly, it must be observed that the court's attributing libelant's fall to beans from defective bags appears to be based primarily on it's mistaken finding that a bag broke in mid-air.

In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 229

FEDERICO MARIN GUTIERREZ,
PETITIONER,

v.

WATERMAN STEAMSHIP CORP.,
RESPONDENT.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

Table of Authorities Cited

Statute

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Opinion of the Court of Appeals

The opinion of the Court of Appeals, printed as an appendix to the Petition (Pet. 15-21), is reported at 301 F. 2d 415.

Questions Presented

Respondent submits that question A as stated by Petitioner should be rephrased: "Does the obligation of sea-

worthiness traditionally owned by an owner of a ship extend to areas on land over which the shipowner has no control".

Respondent agrees that question B, as stated by the Petitioner, should be answered in the negative, but urges that there was no evidence before the District Court to support a finding of negligence on the part of the shipowner.

Statement of the Case

Respondent adds to petitioner's statement that Petitioner took his orders solely from the independent stevedoring contractor; he had no contact whatsoever with any of the vessel's officers or agents. The area where Petitioner was injured was owned, operated and under the possession and control of an entity not involved in the suit.

Argument

The opinion below is not in conflict with any Statute of Congress, nor with decisions of this Court or of other Circuits.

1. UNSEAWORTHINESS.

The cases cited by petitioner are not in point. They all decide that longshoremen injured because of defective ship's equipment, are entitled to recover from the shipowner even if they are standing on the dock at the time of the injury.

In *Strika* v. *Netherlands Ministry of Traffic*, 2 Cir. 1950, 185 F. 2d 555; cert. denied, (1951) 341 U.S. 904, the longshoreman was injured while on the dock, when a hatch cover fell on him because of the failure of the ships tackle.

In *Pope & Talbot, Inc. v. Cordray*, 9 Cir. 1958, 258 F. 2d 214, a longshoreman was injured aboard the vessel when a block, which was part of the ship's gear, dropped and struck him on the head.

In *American Export Lines, Inc. v. Revel*, 4 Cir. 1959, 266 F. 2d 82, a defective ship's winch caused a pallet loaded with drums to strike the side of the vessel, the drums fell to the pier and one of them injured the plaintiff.

Hagans v. Farrell Lines, Inc., 3 Cir. 1956, 237 F. 2d holds that a longshoreman standing on the dock and struck by a draft of cocoa beans because of a defective ship's winch, is entitled to recover.

The above cases are clearly distinguishable from the one under discussion. In every one of them the injury was directly caused by some defect in the ship's gear. Petitioner was injured because of a condition created on land by his employer in an area over which the vessel owner had no control.

The cases of *Ryan Stevedoring Co., Inc. v. Pan Atlantic Steamship Corp.*, 1956, 350 U.S. 124, 76 S. Ct. 232, 100 L. Ed. 133; *Amador v. A S J. Ludwig Mowinckels Rederi*, 2 Cir. 1955, 224 F. 2d 437, certiorari denied, 350 U.S. 901, 76 S. Ct. 179, 100 L. Ed. 791; *Gindrille v. American Hawaiian Steamship Company*, 3 Cir. 1955, 224 F. 2d 746; *Curtiss v. A. Garcia & Cia.*, 3 Cir. 1957, 241 F. 2d 30; *Reddick v. McAllister Lighterage Line*, 2 Cir. 1958, 258 F. 2d 297 and *Rich v. Ellerman & Bucknall SS Co.*, 2 Cir. 1960, 278 F. 2d 704 are also not in point. In each of these the longshoreman was injured on board the vessel because of an unseaworthy condition created by the improper stowage of the cargo aboard the vessel.

The question presented in this case as to the extension of the doctrine of seaworthiness has been answered by another circuit in the same manner as the Court of Appeals.

In *Fredericks v. American Export Lines*, 2d Cir. 1955,

227 F. 2d 450, a longshoreman engaged in discharging cargo from a vessel was injured on a pier as a result of a defective skid furnished by the stevedoring contractor. In deciding that the long-shoreman was not entitled to recover the court states:

> "Finally, while in recent years the warranty of seaworthiness has been held by the Supreme Court to cover a pretty wide territory . . ., nevertheless, here the injury was incurred by a longshoreman standing on a pier, as a result of the failure of a defective appliance located on the pier and furnished by a subcontractor. No decision so far has extended the sweeping protection of the seaworthiness doctrine to this situation. No vessel was connected with the accident".

See also the cases cited by the Court of Appeals.

Partenweederei MS Belgrano v. *Weigel*, 9 Cir. 1962, 299 F. 2d 897.
Kent v. *Shell Oil Co.*, 5 Cir. 1961, 286 F. 2d 746.

It has long been established that a pier is an extension of the land and beyond the admiralty and maritime jurisdiction.

Cleveland T. & V. R. Co. v. *Cleveland SS Co.*, 208 U. S. 316 (1908).

State law applies to an accidental injury occurring upon a pier.

State Industrial Commission v. *Nordenholt Corp.*, 259 U.S. 263 (1922).
Smith & Sons v. *Taylor*, 276 U.S. (1928).
The Plymouth, 3 Wall. 20.

The extension of Admiralty and Maritime Jurisdiction Act, 46 U.S.C.A. 740 does not afford petitioner any remedy against the respondent. The Act extends the jurisdiction intended by Congress solely to damage or injury caused by a vessel on navigable water. Petitioner's injury was in no sense caused by "a vessel". It was not the vessel who failed to discover the spilled beans on the area where petitioner was injured, or who failed to take corrective action. The only connection between the spilled beans and the vessel was that the vessel had previously transported them as a common carrier by water.

II. NEGLIGENCE

The cases cited by petitioner are also not in point. In all of them the trial court had before it evidence of specific acts of negligence on the part of the vessel. In the case under discussion, as the record shows, there was not a scintilla of evidence to support a finding of negligence.

In *Imperial Oil, Limited* v. *Drlik*, 6 Cir. 1956, 234 F.2d 4, contrary to what is stated by petitioner, the plaintiff was not a longshoreman. He was an employee of an entity performing repairs to the vessel and was assisting the ship in undocking at the time of the injury. The mooring cables were running from the ship's winches and tied to spiles on shore. The tightening of the cables was done by means of the winch operated by a member of the vessel's crew who, without warning, set the winch in motion, causing one of the mooring cables to become taut and injuring the plaintiff who was handling the mooring line on shore. The court found that the ship owner had been negligent in not having some one coordinating the work of the crew member on board the vessel with that of the plaintiff on shore.

Beard v. *Ellerman Lines, Ltd.*, 3 Cir. 1961, 289 F.2d 201, can also be clearly distinguished. There was evidence that

the cargo was being discharged by dangerous methods, that the first officer of the vessel had observed the manner of discharging and that the vessel had failed to furnish plaintiff with a safe place to work. The longshoreman was injured aboard the vessel, and the jury found that the vessel had been negligent.

The statement contained in petitioner's brief regarding to what is held in *Marceau* v. *Great Lakes Transit Corp.*, 2 Cir. 1945, 146 F.2d 416, is incorrect. This case holds that a seaman is entitled to the remedies of the Jones Act, even if his injuries were suffered on shore, because at the time of the occurrence he was in the ship's service and the dock where he was injured was under the possession and control of the ship owner.

III. Laches

The Court of Appeals was justified in deciding that Petitioner's claim was barred by laches. The trial court's only basis for excusing the delay in bringing suit was that libelant had consulted with an attorney within the statutory period and to justify lack of prejudice, the court relied on the fact that certain witnesses and records were available. The records showed that the memory of the witnesses was quite impaired and that the testimony presented was in conflict with the documentary evidence under *McAllister* v. *United States*, 348 U.S. 19, 75 S. Ct. 6, 99 L. Ed. 20. There was ample basis in the record to sustain the Circuit Court's finding that the respondent was prejudiced by the delay.

IV. The Court of Appeals Did Not Deviate From This Court's Accepted Principles in Reviewing Findings of the Trial Court.

There having been no evidence whatsoever to support the finding of negligence, the court's finding as to unseaworthiness having been clearly erroneous, and the record clearly showing that Petitioner incurred in laches, without excusing his delay and prejudicing the respondent, the findings of the trial court were clearly erroneous and the Circuit Court was justified in reversing the decree.

Conclusion

It is respectfully submitted that the Petition for Writ of Certiorari should be denied.

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 229

FEDERICO MARIN GUTIERREZ,
PETITIONER,

v.

WATERMAN STEAMSHIP CORP.,
RESPONDENT.

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF FOR PETITIONER

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INDEX

Cases Cited

Page

STATUTES

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BRIEF FOR PETITIONER

Opinions Below

The opinion of the United States Court of Appeals for the First Circuit is reported below at 301 F.2d 415. The opinion of the United States District Court for the District of Puerto Rico was reported at 193 F. Supp. 894.

Jurisdiction

The judgment of the United States Court of Appeals for the First Circuit was entered April 11, 1962. Petition for a Writ of Certiorari was filed on July 5, 1962 and was granted, October 8, 1962.

The jurisdiction of this Honorable Court to review the final judgment of the United States Court of Appeals for the First Circuit is provided by Sections 1254 (1) and 2101 (c) of Title 28, U. S. Code.

Constitutional and Statutory Provisions

The constitutional provision involved is:

United States Constitution, Article 3, Section 2:

> "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;— to all Cases of admiralty and maritime jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."

The statutes involved are:

Public Law 695 of June 19, 1948, c. 526, 62 Stat. 496; 46 U. S. Code, Section 740.

"The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land.

"In any such case suit may be brought in rem or in personam according to the principles of law and the rules of practice obtaining in cases where the injury or damage has been done and consummated on navigable water: *Provided*, That as to any suit against the United States for damage or injury done or consummated on land by a vessel on navigable waters, the Public Vessels Act or Suits in Admiralty Act, as appropriate, shall constitute the exclusive remedy for all causes of action arising after June 19, 1948, and for all causes of action where suit has not been hitherto filed under the Federal Tort Claims Act: *Provided further*, That no suit shall be filed against the United States until there shall have expired a period of six months after the claim has been presented in writing to the Federal agency owning or operating the vessel causing the injury or damage."

Laws of Puerto Rico Annotated, Title 11, Section 32:

"In cases where the injury, the occupational disease, or the death, entitling the workman or employee, or his beneficiaries, to compensation in accordance with this chapter, has been caused under circumstances making third parties liable for such injury, disease or death, the injured workman or employee or his beneficiaries may claim and recover damages from the third party liable for said injury, disease, or death, within one year following the date when becomes final the decision of the case by the Manager of the State

Insurance Fund who may subrogate himself in the rights of the workman or employee or his beneficiaries to institute the same action in the following manner:

"When an injured workman or employee, or his beneficiaries in case of death, may be entitled to institute an action for damages against a third person in cases where the State Insurance Fund, in accordance with the terms of this chapter, is obliged to compensate in any manner or to furnish treatment, the Manager of the State Insurance Fund shall subrogate himself in the rights of the workman or employee or of his beneficiaries, and may institute proceedings against such third person in the name of the injured workman or employee, or of his beneficiaries, within the ninety (90) days following the date on which the decision of the case becomes final and executory, and any sum which as a result of the action, or by virtue of a judicial or extra-judicial compromise, may be obtained in excess of the expenses incurred in the case, shall be delivered to the injured workman or employee or to his beneficiaries entitled thereto. The workman or employee or his beneficiaries shall be parties in every proceeding instituted by the Manager under the provisions of this section, and it shall be the duty of the Manager to serve written notice on them of such proceedings within (5) days after the action is instituted.

"If the Manager should fail to institute action against the third party liable, as set forth in the preceding paragraph, the workman or employee, or his beneficiaries, shall be fully at liberty to institute such action in their behalf, without being obliged to reimburse the State Insurance Fund for the expenses incurred in the case.

"Neither the injured workman or employee, nor his beneficiaries, may institute any action or compromise

any cause of action they may have against the third party liable for the damages, until after the lapse of ninety days from the date on which the decision of the case by the Manager of the State Insurance Fund became final and executory.

"No compromise between the injured workman or employee, or his beneficiaries in case of death, and the third party liable, made within the ninety (90) days following the date on which the decision of the case becomes final and executory, or after the lapse of said term if the Manager has filed his complaint, shall be valid or effective in law unless the expenses incurred by the State Insurance Fund in the case are first paid; and no judgment shall be entered in suits of this nature, nor shall any compromise whatsoever as to the rights of the parties to said suits shall be approved, without making express reserve of the right of the State Insurance Fund to reimbursement of all expenses incurred; Provided, That the secretary of the court part taking cognizance of any claim of the nature described above shall notify the Manager of the State Insurance Fund any order entered by the court which affects the rights of the parties to the case, as well as the final disposition of said case.

"The Manager of the State Insurance Fund may, with the approval of the Secretary of Labor of Puerto Rico, compromise as to his rights against a third party liable for the damages; It being understood, however, That no extrajudicial compromise shall impair the rights of the workman or employee, or of his beneficiaries, without their express consent and approval.

"Any sum obtained by the Manager of the State Insurance Fund through the means provided in this section shall be covered into the State Insurance Fund

for the benefit of the particular group into which was classified the occupation or the industry in which the injured or dead workman or employee was employed. Amended June 15, 1955, No. 70, p. 258, § 2, eff. June 15, 1955."

Statement of the Case

On October 21, 1956, Federico Marin Gutierrez, a longshoreman employed by an independent stevedoring contractor, was injured when he fell on the apron of the pier in Ponce, Puerto Rico, during the course of the unloading of the SS HASTINGS, a vessel owned and operated by the respondent.

The petitioner's duties were performed entirely on shore and he never went aboard the vessel. Prior to his injury, the vessel had discharged torn bags of beans, whose contents were spilled on the apron of the pier. Petitioner, engaged in the discharging operation, slipped on some of the spillage, fell and injured his back. The spillage had been observed while the bags were in midair on drafts attached to the ship's discharging equipment. (R. 23, 76, 77, 78, 152, Exhibit 10, 156 through 164).

Suit was filed in the United States District Court for the Southern District of New York on January 9, 1959. Under the analogous statute of limitations, 11 L.P.R.A. 32, the time to file would have expired on November 30, 1957. The libel specifically pleaded that laches did not apply because of excusable delay and absence of prejudice to the respondent. (R. 6 through 7).

The trial commenced on March 21, 1960. During the pendency of the action, prior to trial, the respondent caused the deposition of the petitioner to be taken and served interrogatories upon the petitioner, which were answered. In the deposition and in the answers to the inter-

rogatories, the petitioner gave the names and addresses of the eye-witnesses but the respondent made no effort to contact the witnesses prior to trial. (R. 151 and 153). The records of the respondent also indicated the eye-witnesses. (R. 132, 135).

At the conclusion of the trial, the Court stated:

> "Of course, I should advance to counsel, I believe that on the question of unseaworthiness and or negligence, the libelant has made a case, that as regards the question of laches the libelant has shown sufficient excuse for the delay, and that the only two questions with which the Court is really concerned are the question of the actual physical damage suffered by libelant as a consequence of the October 21, 1956 accident. Whether his present physical state is totally the result of that accident, or whether the accident aggravated in some way his physical state resulting from the 1951 accident, or whether the 1959 accident aggravated and to what extent the previous physical condition of the libelant.
>
> "I believe that in order to decide that, it is indispensable that the parties get a transcript of the medical testimony in the case, particularly I want to read pretty carefully the testimony of the two main experts, Dr. Rifkinson and Dr. Ramirez de Arellano. Of course, I have no doubt that part of the present condition of the libelant is due to the 1956 accident, but to what extent, and that's the important thing, in order to determine the damages.
>
> "I believe as to the material aspect of the damages I want the parties to discuss that more or less what appears from the evidence as to actual earnings of this libelant, if there is any evidence as to it, because the evidence is very weak in that. That's all I need.

> "I believe it isn't necessary to file briefs or discuss the exceptive allegations, and I had the opinion that it would have been factual and unnecessary to discuss those exceptive allegations. They are based precisely on what transpired at the trial. They stand or fall on the evidence offered here, so it is not necessary to make a separate discussion of that. Indeed, I believe that what I have said now disposes of the exceptive allegations." (R. 153-154).

Thereafter, the District Judge filed his opinion, findings of fact and conclusions of law. A specific finding was made that beans had been observed spilling from the drafts that were discharged from the vessel throughout the unloading operation. (R. 18). Another finding was made that the beans scattered about the surface of the pier created a dangerous condition for the longshoremen. (R. 18). It was also found that the cargo being discharged was defective and unseaworthy and that the shipowner was negligent in permitting the broken bags to be discharged and in failing to furnish libellant with a safe place to work. (R. 18-19).

Inasmuch as the documentary evidence produced by the respondent revealed the only potential eye-witnesses and also indicated cargo damage and spillage prior to and at the time of discharge, as well as the fact that medical evidence, including that of the treating physicians, was available, the District Court also found that the respondent had suffered no prejudice by the lapse of time between the injury and the filing of the suit. (R. 19).

The United States Court of Appeals for the First Circuit reversed all of these conclusions and findings. If the issues of unseaworthiness, negligence and laches are examined in inverse order, from that in which discussed in the opinion below, one finds that the Court of Appeals agreed that the suit would not be barred in the absence of prejudice, but

it concluded that the trial court erred in its evaluation of the factual evidence on which the finding of absence of prejudice was based. Not only did the appellate court make contrary findings of fact as to the issue of negligence, it also injected into the doctrine of negligence a new element;—that the tortfeasor must control or have a right to control the situs where the injury is consummated. Finally, on the issue of unseaworthiness the Court of Appeals for the First Circuit, while admitting that the condition of cargo may render a vessel unseaworthy and that the injured longshoreman was within the class of persons protected by the doctrine, refused to allow the decree to stand. Reasoning that the obligations of the doctrine of unseaworthiness were "awesome" and that the longshoreman was not about to go on a voyage, the Court concluded that it would not impose absolute liability upon the shipowner for injury to a shoreworker in circumstances which it conceded would ordinarily result in a recovery.

In short, to use their own expression, the Court refused to cross the gangway. The Congressional enactment extending admiralty jurisdiction to injuries consummated on land was fully briefed on appeal to the Court of Appeals and was totally ignored by the Court.

Questions Presented

1. Does a person, otherwise protected by the humanitarian doctrine of unseaworthiness, lose his rights under said doctrine, if he is injured ashore as a result of the unsafe condition of the cargo?

2. Does a shipowner who incurs in negligence that foreseeably will result in harm to a person, cease to be liable if the ultimate injury is consummated at a location that he does not control?

3. May the mere passage of time bar an otherwise meri-

torious claim if the trial court finds the respondent is not prejudiced by the delay?

4. Does an appellate court sitting in admiralty have the discretion to make findings of fact from the record, contrary to those of the trial court, if the original findings are amply supported by credible evidence?

Argument

POINT I. LONGSHOREMEN INJURED ASHORE, WHILE ENGAGED IN THE SERVICE OF THE SHIP, ARE ENTITLED TO THE SAME PROTECTION UNDER HUMANITARIAN DOCTRINE OF SEAWORTHINESS AS ARE LONGSHOREMEN INJURED ABOARD.

A shipowner warrants that his vessel is seaworthy.[1] This warranty runs to seamen[2] and to those performing the work traditionally done by seamen,[3] but does not apply to those not doing such work even if for the benefit of the ship.[4] That the doctrine extends to longshoremen is no longer an open question.[5] Nor has it ever been suggested that discharge of cargo, which is today generally done by longshoremen, was not the historical function of seamen.[6] The question posed by the decision below is whether that

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[1] *The Osceola*, 1903, 189 U.S. 158, 23 S. Ct. 483, 47 L. Ed. 760.

[2] *Mahnich* v. *Southern Steamship Co.*, 1944, 321 U.S. 96, 64 S. Ct. 445, 88 L. Ed. 561.

[3] *Seas Shipping Co.* v. *Sieracki*, 1946, 328 U.S. 85, 66 S. Ct. 872, 90 L. Ed. 1099; *Pope & Talbot* v. *Hawn*, 1953, 346 U.S. 406, 74 S. Ct. 202, 98 L. Ed. 143.

[4] *United New York and New Jersey Sandy Hook Pilots Ass'n.* v. *Halecki*, 1961, 358 U.S. 613, 79 S. Ct. 517, 3 L. Ed. 2d 541; *Noel* v. *Isbrandtsen Company*, 4 Cir. 1961, 287 F.2d 783.

[5] *Seas Shipping Co.* v. *Sieracki*, *supra*; *The State of Maryland*, C.C.A. 4th, 1936, 85 F.2d 944.

[6] Jacobsen. *Laws of the Sea* (1819); *Dixon* v. *The Cyrus*, (D. Pa. 1789) 7 Fed. Cas. 755, Case No. 3,930; *Cloutman* v. *Tunison* (Cir. 1881) 6 Fed. 830; *The Circassion*, 1 Ben. 209, Fed. Cas. No. 2,722, (1867); *Gilbert Knapp*, 37 Fed. 209 (1889).

doctrine applies to a longshoreman injured on land. Other Circuits have resolved this question, reaching a result contrary to that of the First Circuit in the case at bar.[7]

In the landmark decision of *Seas Shipping Co.* v. *Sieracki*, 1946, 328 U.S. 85, 66 S. Ct. 872, 90 L. Ed. 1099, this Court anticipated the issue here presented and left it unanswered.[8] In 1946 the question presented a more difficult problem than it does today. At that time, land as a situs was beyond the reach of admiralty and maritime jurisdiction and a pier was held to be an extension of the land.[9] The doctrine of seaworthiness was a maritime concept and could not apply to a tort occurring on land where local law was supreme, albeit different as one moved from state to state.

Two years later Congress provided a solution startingly simple—it extended the admiralty and maritime jurisdiction to include "all cases of damage or injury, to persons or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land."[10] Henchforth, a vessel would have

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[7] *Strika* v. *Netherlands Ministry of Traffic*, 2 Cir. 1950, 185 F.2d 555; cert. denied. (1951), 341 U.S. 904, 71 S. Ct. 614, 95 L. Ed. 1343; *Pope & Talbot, Inc.* v. *Cordray*, 9 Cir., 1958, 258 F.2d 214; *American Export Lines, Inc.* v. *Revel*, 4 Cir., 1959, 266 F.2d 82; *Hagans* v. *Farrell Lines, Inc.*, 3 Cir. 1956, 237 F.2d 477.

[8] "In this case we are not concerned with the question whether the same policy extends to injuries incurred ashore by a stevedore engaged in the same work, a matter which is relevant however in *Swanson* v. *Marra Brothers, Inc.*, 328 U.S. 1, 66 S. Ct. 869; *Cf. O'Donnell* v. v. *Great Lakes Dredge & Dock Co.*, 318 U.S. 36, 63 S. Ct. 488, 87 L. Ed. 596". 328 U.S. 85 at p. 100; 66 S. Ct. 872, at p. 880.

[9] *Cleveland T. & V.R. Co.* v. *Cleveland Steamship Co.* (1908), 208 U.S. 316, 28 S. Ct. 414, 52 L. Ed. 508; *State Industrial Commission* v. *Nordenholt Corporation*, 1922, 259 U.S. 263, 42 S. Ct. 473, 66 L. Ed. 933; *T. Smith & Son* v. *Taylor*, 1928, 276 U.S. 179, 48 S. Ct. 228, 72 L. Ed. 520; *The Plymouth*, 1886, 70 U.S. (3 Wall.) 20, 18 L. Ed. 125.

[10] Public Law 695 of June 19, 1948, c. 526, 62 Stat. 496; 46 U.S. Code, Section 740.

the same obligations regardless of where the injury was consummated, including *in rem* liability, and the uniformity of the admiralty law, so anxiously sought,[11] was now achieved. The first case[12] decided after passage of the act referred at once to the question left unanswered in *Sieracki*, supra. In *Sieracki*, this Court cited *Swanson* v. *Marra Brothers, Inc.*, 328 U.S. 1, 66 S. Ct. 869, 90 L. Ed. 1045, which was decided the very same day as *Sieracki*. Swanson involved the harmonization of *O'Donnell* v. *Great Lakes Dredge & Dock Co.*, supra, and *International Stevedore Co.* v. *Haverty*,[13] a decision dating from 1926.

In 1926, longshoremen were considered to be seamen for some purposes, among which was the right to bring suit against their employers under the Jones Act.[14] In 1927, Congress enacted the Longshoremen's and Harbor Workers' Compensation Act,[15] which eliminated longshoremen from coverage under the Jones Act because they were not members of the crew of a vessel, and which also made compensation the exclusive remedy against the employer.

The *O'Donnell* case held that a seaman injured on land could recover under the Jones Act for the injuries resulting from the negligence of a fellow seaman. Haverty, a longshoreman, had recovered under the Jones Act from his employer for injuries suffered aboard the vessel. In the *Swanson* case the plaintiff longshoreman juxtaposed the *Haverty* and *O'Donnell* cases and claimed the right to

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[11] *Southern Pacific Co.* v. *Jensen*, 1917, 244 U.S. 205, 37 S. Ct. 524, 61 L. Ed. 1086.

[12] *Strika* v. *Netherlands Ministry of Traffic*, 2 Cir. 1950, 185 F.2d 555.

[13] *International Stevedore Co.* v. *Haverty*, 1926, 272 U.S. 50, 47 S. Ct. 19, 71 L. Ed. 157.

[14] Act of June 5, 1920, c. 250, § 33, 41 Stat. 1007, 46 U.S.C.A. § 688.

[15] Federal Longshoremen's and Harbor Workers' Compensation Act, Mar. 4, 1927, c. 509, § 1, 44 Stat. 1424, 33 U.S.C.A. § 901 et seq.

recover under the Jones Act for negligently inflicted injuries sustained ashore. Although the plaintiff in the *Swanson* case tried to ignore the statute which legislatively overruled *Haverty*, this Court did not do so and denied recovery.

There remained the original question as posed by *Sieracki* prior to the passage of the Extension of Admiralty and Maritime Jurisdiction Act. Stated otherwise—would Swanson have recovered for injuries ashore had he sued the vessel or its owner instead of his employer?

Judge Learned Hand reasoned that Swanson would have recovered in admiralty independent of the jurisdiction conferred by Congress.[16] In his opinion, Swanson was denied recovery only because the Longshoremen's and Harbor Workers' Compensation Act barred him from suing his employer. Had that statute not been passed, Swanson would have recovered as did the seamen O'Donnell, who was also injured ashore. Inasmuch as Swanson was distinguished in the Sieracki opinion not on the basis of the situs of the accident, but only because compensation had become the exclusive remedy against the employer, Judge Hand concluded that if Swanson had sued the vessel, he would have been entitled to recover under the doctrine of unseaworthiness, and he therefore affirmed an award as to the longshoreman, Strika.

Judge Swan dissented because he felt that any extension of the doctrine of unseaworthiness to shore-based longshoremen should be decided only by this tribunal. Whether this Court agreed with Judge Hand's reasoning, or whether the passage of the Extension of Admiralty and Maritime Jurisdiction Act was the basis of decision, is not significant. In any event certiorari was denied,[17] and there-

[16] *Strika* v. *Netherlands Ministry of Traffic*, 2 Cir. 1950, 185 F.2d 555.

[17] 341 U.S. 904, 71 S. Ct. 614, 95 L. Ed. 1343.

after all shore-based longshoremen enjoyed a remedy against the vessel and its owner.

From *Strika* to the decision below, every federal court in the intervening twelve years has granted recovery to longshoremen injured ashore as a result of an unseaworthy condition:

Hagans v. *Farrell Lines, Inc.*, 3 Cir. 1956, 237 F.2d 477 [18]

Pope & Talbot, Inc. v. *Cordray*, 9 Cir. 1958, 258 F.2d 214 [19]

American Export Lines, Inc. v. *Revel*, 4 Cir. 1959, 266 F.2d 82

Valerio v. *American/President Lines*, D.C.S.D.N.Y. 1952, 112 F. Supp. 202.

Litwinowicz v. *Weyerhaeuser SS Co.*, D.C.E.D. Pa. 1959, 179 F. Supp. 812.

Di Salvo v. *Cunard S.S. Co.*, D.C.S.D.N.Y. 1959, 171 F. Supp. 813.

Hagans v. *Ellerman & Bucknall Steamship Co.*, D.C. E.D. Pa. 1961, 196 F. Supp. 593.

Fisher v. *United States Lines Company*, D.C.E.D. Pa. 1961, 198 F. Supp. 815.

Because the unseaworthiness obligations are "awesome", the Court below refused to "cross the gangway". The reasons given fall into two classes: one, that although a longshoreman, and performing the traditional work of a seaman, the petitioner was not about to go on a voyage, and a new label should be devised for him, denying him

[18] In this case, neither the lawyers nor the courts raised any question as to the longshoreman's right to recover.

[19] The longshoreman's duties in this case were primarily ashore but he was injured aboard. The Court of Appeals stated: "We ho'd that the duty of providing a seaworthy ship and gear at the time of this accident extended to appellee, whether or not appellee was on board the ship or on the dock". 258 F.2d 214, 218.

the concommitant rights of this "awesome" duty; and, two, that although the condition of the cargo was unseaworthy, this should not impose absolute liability, at least, not to this petitioner.

The doctrine of seaworthiness has long troubled the Court of Appeals for the First Circuit. In 1959, that Court felt that the law should be different from the pronouncements of the Supreme Court.[20] The decision below is but another attempt to turn back the clock and abrogate the doctrine.

What is seaworthiness?

> "It is a form of absolute duty owing to all within the range of its humanitarian policy.
>
> "On principle we agree with the Court of Appeals that this policy is not confined to seamen who perform the ship's service under immediate hire to the owner, but extends to those who render it with his consent or by his arrangement. All the considerations which gave birth to the liability and have shaped its absolute character dictate that the owner should not be free to nullify it by parcelling out his operations to intermediary employers whose sole business is to take over portions of the ship's work or by other devices which would strip the men performing its service of their historic protection.".[21]

If the considerations that gave birth to the liability are still existent, and if the owner may not delegate his responsibility, by what right is a longshoreman who it is conceded was performing the seaman's historical duty eliminated from the scope of the policy? The ship was

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[20] *Mitchell* v. *Trawler Racer, Inc.*, 1 Cir. 1959, 265 F.2d 426, reversed, 1960, 362 U.S. 539, 80 S. Ct. 926, 4 L. Ed. 2d 941.

[21] *Seas Shipping Co.* v. *Sieracki*, 328 U.S. at page 95.

no less unseaworthy and the injured worker no less a longshoreman than were the vessels or claimants in any of the other cases. It is the status of the injured worker that governs the relationship.

Only two cases are cited by the Court of Appeals to support its position and neither is apposite. *Partenweederei Ms Belgran* v. *Weigel*, 9 Cir. 1962, 299 F.2d 897, certiorari denied October 8, 1962, is not in accord with the First Circuit in recognizing limits in this area to principles of absolute liability. There can be no doubt that the Court of Appeals for the Ninth Circuit would have decided the case at bar as did the District Court below. In denying extension of the doctrine to a tractor driver, that Court established the criteria for determining who falls within the scope of the doctrine:

> "The evidence of this case relating to the nature of libelant's work is not in dispute. The libelant was driving a tractor on the dock. His job was to push or pull railroad cars loaded with lumber up to a point on the spur track where the lumber could be reached by the ship's loading gear. He did not participate in loading the lumber onto the vessel or in stowing it. He had nothing to do with ship's tackle nor did his work require him to perform any service aboard the ship. His work was performed solely on the dock and in an operation preliminary to, but separate from, the work of loading the lumber onto the vessel. Although libelant's work brought him close enough to the vessel to be injured by the falling boom, liability arises not from the place of injury but from the nature of the work being performed. . . .
>
> "Was the nature of libelant's work of the type traditionally performed by seamen?" 299 F.2d at page 902.

The petitioner herein *did* participate in discharging the cargo from the vessel. His work *was* directly concerned with the ship's tackle. His work was *not* separate from the discharge. His work *was* of the type traditionally performed by seamen.

The only similarity between the two cases is that the worker did not recover—in the one case, because he was not within the scope of the doctrine, and in the instant case, because the Court has arbitrarily refused to apply the doctrine.

The other citation in the opinion below lends no support to the position taken by the Court of Appeals for the First Circuit. *Kent* v. *Shell Oil Company*, 5 Cir. 1961, 286 F.2d 746, neither limits the doctrine of unseaworthiness nor of maritime negligence. Kent, a truck driver, was injured when replacing wooden skids on the ground between his truck and a barge. He tried his case to a jury without offering proof of any unseaworthy condition. He requested a charge on that issue, which became the crucial question on appeal. The Court of Appeals for the Fifth Circuit held that the injuries were non-maritime in nature, that no evidence had been presented so as to instruct the jury on unseaworthiness, and specifically refrained (in footnote 14 at page 751) from taking a stand on the issues presented in *Strika*, *Cordray* and *Valerio*, *supra*.

This year the same Court has *sub silencio* taken a stand and has aligned itself with all other Circuits except the First. In *Koninklyke Nederlandshe, etc.* v. *Strachan Shipping Co.*, 5 Cir. 1962, 301 F.2d 741, rehearing denied, June 20, 1962, a shore-based longshoreman was allowed to recover, and the vessel owner was granted indemnity against the stevedoring contractor. To be sure, the longshoreman's claim was compromised prior to trial and the only issue was whether the steamship company's right to indemnity

was cut off by the workmen's compensation law of Texas. Said the Court at page 746:

> "We held in Kent, supra, that a state compensation act can bar an injured employee from suing a third party. If, however, such a suit is permitted, and is pursued to final settlement, a state compensation act cannot prevent an action against the employer by the third party based on federal judicially established maritime warranty."

Implicit in the above quotation is the proposition that a state can no more bar a claim under federal judicially established principles of unseaworthiness than it can bar the claim by the third party against the employer. There can be no valid claim for indemnity unless there is a valid claim against the indemnitee. Whereas Kent was a truck driver whose injury was non-maritime, Rawlinson, the injured party in the latter case, was a shore-based longshoreman, injured, presumably, as a result of unseaworthiness. The Court of Appeals for the First Circuit to build upon the Kent case has sunk its piles into quicksand. This becomes readily apparent if we return to the Kent case to see the context of its quotation including the phrase "awesome obligations."

> "Unseaworthiness to be sure sets in train awesome obligations which distinguish it from negligence. (Citations omitted). But neither under negligence principles nor the unseaworthiness doctrine does mere injury give rise to a claim. There must be evidence . . . Nor was there any evidence."
>
> 286 F2d 746, at 752.

This is hardly basis for saying longshoremen injured ashore cannot recover and the District Courts in the Fifth Circuit, relying on these cases and the Extension of Admiralty and Maritime Jurisdiction Act consistently follow the view of *Strika*.

Leonard v. *Lykes Brothers Steamship Co.*, D.C.E.D. La. 1962 F. Supp. ; *Matherne* v. *Superior Oil Company*, D.C.E.D. La. 1962, 207 F. Supp. 591.

The unseaworthy condition itself, the broken cargo, was "being used" to impose liability, according to the Court below. For its view, which again is contrary to all other reported cases, the Court cited no authority. The contrary authority includes:

Ryan Stevedoring Co., Inc. v. *Pan Atlantic Steamship Corp.*, 1956, 350 U.S. 124, 76 S. Ct. 232, 100 L. Ed. 133

Amador v. *A/S Ludwig Mowinckels Rederi*, 2 Cir. 1955, 224 F.2d 437, certiorari denied, 350 U.S. 901, 76 S. Ct. 179, 100 L. Ed. 791.

Gindville v. *American Hawaiian Steamship Company*, 3 Cir. 1955, 224 F.2d 746.

Curtiss v. *A. Garcia Y Cia.*, 3 Cir. 1957, 241 F.2d 30.

Reddick v. *McAllister Lighterage Line*, 2 Cir. 1958, 258 F.2d 297.

Rich v. *Ellerman & Bucknall SS Co.*, 2 Cir. 1960, 278 F.2d 704.

Some of the District Court cases previously cited involved the same combination of factors as did the instant case—unseaworthy cargo and shore-side injuries. All District Judges (including the District of Puerto Rico), relying on the same authorities, granted recovery.

Valerio v. *American President Lines*, D.C.S.D.N.Y. 1952, 112 F. Supp. 202.

Robillard v. *A. L. Burbank & Co., Ltd.*, D.C.S.D.N.Y. 1960, 186 F. Supp. 193.

Hagans v. *Ellerman & Bucknall Steamship Co.*, D.C. E.D. Pa. 1961, 196 F. Supp. 593.

Once an unseaworthy condition exists, it does not cease to be an unseaworthy condition because the injury is consummated on land. Nor is there any reason why a condition which is the proximate cause of damage should cease to impose liability because the injured worker is handling tackle ashore rather than aboard.

Upon analysis, what disturbs the Court of Appeals for the First Circuit is not situs, status nor foreseeability. The petitioner herein was closer to the vessel than either Hagans or Russo (in the *Valerio* case) or Revel or Robillard or Di Salvo or Litwinowicz. No one has ever suggested that the petitioner was outside the scope of the warranty of seaworthiness. Unlike the weird combinations of factors that have caused some courts to limit the ambit of responsibility[22] in tort law, there was no question that the condition was as likely to cause harm to workers ashore as aboard. Neither logic nor law supports the result. Apparently the desire to impose limits to the "awesome obligation" of unseaworthiness has prompted this decision. Just as in *Mitchell* v. *Trawler Racer, Inc.*, 1 Cir., 1959, 265 F2d 426, reversed, 1960, 362 U.S. 539, 80 S. Ct. 926, 4 L. Ed. 941. Wherein the Court below tried to limit the doctrine in time, it now has tried to limit the doctrine in space.

If as this Court has labeled it, the doctrine is a humanitarian one, it may not be so limited.

[22] e.g., *Palsgraf* v. *Long Island R. Co.*, 1928, 248 N.Y. 339, 169 N.E. 99, 59 A.L.R. 1253.

POINT II. A SHIPOWNER MAY BE LIABLE FOR NEGLIGENCE IF IT IS FORSEEABLE THAT THE ACTS OR OMISSIONS ABOARD ARE LIKELY TO HARM PERSONS ASHORE.

In its findings (R. 18-19) the trial court found that beans had been observed spilling from drafts,[23] that beans were scattered about the pier,[24] that the shipowner was negligent in permitting the broken and weakened cargo to be discharged when it knew or should have known that injury was likely to result,[25] that the respondent was negligent in allowing this condition to remain existent, and that the respondent had failed to furnish petitioner with a safe place to work.[26]

The Court of Appeals has ruled that these findings cannot stand. As to the substantiality of evidence to support these findings, more will be said below. We are now concerned with two other matters injected by the appellate tribunal. It is claimed that if there was spillage which caused an unsafe condition, respondent was not shown to have participated in that conduct nor did it control or have the right to control the locus of the accident.[27]

Control or the right to control the locus of injury is not an element of negligence. In basic terms, the Court of Appeals asserts that if A creates or permits a dangerous condition to be created on the property of B and C is injured as a consequence of said dangerous condition, A cannot be liable, no matter how foreseeable that harm would ensue or whether A knew or should have known of the condition. This proposition, we submit, does not reflect the law of negligence as it exists anywhere, least of all under admiralty principles.

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[23] Finding of Fact No. 6, Record, page 18.
[24] Finding of Fact No. 7, Record, page 18.
[25] Finding of Fact No. 9, Record, page 18.
[26] Finding of Fact No. 10, Record, pages 18-19.
[27] Record, page 167.

The risk defines the duty to be obeyed, and whether or not the shipowner participated in the discharge is inconsequential. It permitted this dangerous method of discharge when it had a duty to provide a safe place to work.

By the pronouncement of this Court the shipowner's duty is defined as "exercising reasonable care under the circumstances of each case".[28] For negligently creating a condition ashore, the shipowner has been liable when the injured party was a seaman.[29] For failing to post a watchman, the shipowner has been held liable for resulting injury to a shore-based longshoreman.[30] Whether the shipowner actively participated in creating the dangerous condition or passively permitted the condition to be created by another, his duty to exercise reasonable care did not change. As the trial Court found, the shipowner knew that bags were broken and leaking. If it did not know this, it should have. Coopers were employed aboard and ashore sewing bags. The cargo had arrived in port in that condition and the shipowner permitted its discharge in that condition.

Relying on the same body of decisions as did the trial court below, another District Judge upheld a jury verdict in favor of an injured longshoreman who was 100 feet inside a shed rather than alongside the vessel, declaring:

> "The facts in this case made it abundantly clear that bags of sand stowed in the hold of the vessel were broken and leaking; that they were in that condition when they were placed aboard the sling; that sand continued to seep from the sling as it was hoisted

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[28] *Kermarec* v. *Companie General Transatlantique*, 1959, 358 U.S. 625, 79 S. Ct. 406, 3 L. Ed. 2d 550.

[29] *Marceau* v. *Great Lakes Transit Corporation*, 2 Cir. 1945, 146 F.2d 416.

[30] *Imperial Oil Limited* v. *Drlik*, 6 Cir., 1956, 234 F.2d 4.

from the hold and across the deck of the vessel and that the seepage continued over the apron of the pier to the place where Hagans was working and at the point where he was injured there was a sprinkling of sand on the floor. There was also ample evidence from which the jury could conclude that the injury which he suffered was caused when he slipped on the sand. We cannot give any effect to defendant's argument that this event happened as a result of the condition of the cargo after it had been discharged. The sand being on the pier had a direct casual relation to the improper stowage. In other words, due to improper stowage the ship was unseaworthy and due to the unseaworthiness, Hagans was injured and that created liability which cannot be avoided.

"Defendant next argues that all that it is required to do is furnish a reasonably safe place for plaintiff to work. As we have previously stated, Hagans was, as found by the jury, in the ship's service, the place where he was working was unsafe because of a condition caused by the ship itself, and, therefore, the ship is as liable as though Hagans had slipped on the deck itself.' Furthermore, there was convincing evidence in this case that the manner of discharging the cargo was improper. That in itself could create and did create an unsafe place to work. *Beard* v. *Ellerman Lines, Ltd.*, 3 Cir. 1961, 289 F.2d 201."[31]

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[31] *Hagans* v. *Ellerman & Bucknall SS Co.*, D.C.E.D. Penna., 1961, 196 F.Supp. 593.

POINT III. IN THE ABSENCE OF PREJUDICE TO THE RESPONDENT, THE MERE PASSAGE OF TIME WILL NOT BAR RELIEF UNDER THE GENERAL MARITIME LAW.

Mr. Justice Brennan in his concurring opinion in *McAllister* v. *Magnolia Petroleum Co.*, 1958, 357 U.S. 221, 78 S. Ct. 1201, 2 L. Ed. 2d 1272, stated:

> "Just as equity follows the law in applying, as a rough measure of limitations, the period which would bar a similar action at law, see Russell v. Todd, 309 U.S. 280, 287 (60 S. Ct. 527, 84 L. Ed. 754), I think that the maritime cause of action for unseaworthiness could be measured by the analogous action at law for negligence under the Jones Act, 46 U.S.C. § 688."[32]

If uniformity in the admiralty law is a desirable goal, the logic of the above quotation is compelling. The *McAllister* case was that of a seaman, whose Jones Act action had not prescribed but whose action for unseaworthiness had under the analogous Texas two-year statute. It has been held that the analogous statute in New York is the six year statute[33] and in Puerto Rico it is one year from the date the final decision of the administrator of the State Insurance Fund becomes executory.[34] Thus the yardstick by which laches is measured for the same occurrence will vary depending on whether the injured worker is a seaman or longshoreman, and if the worker be a longshoreman, it will vary from port to port, and even within the same port, depending upon the duration of medical treatment.

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[32] 357 U.S. 221 at page 229, 78 S. Ct. 1201 at 1206.

[33] *Le Gate* v. *The Panamolga*, 2 Cir. 1955, 221 F.2d 689; *Oroz* v. *American Presidents Lines*, 2 Cir., 1958, 259 F.2d 636.

[34] Laws of Puerto Rico Annotated, Title 11, Section 32; *Guerrido* v. *Alcoa Steamship Co.*, 1 Cir., 1956, 234 F.2d 349; *Waterman Steamship Corporation* v. *Rodriguez*, 1 Cir. 1961, 290 F.2d 175.

One's fundamental rights should not depend upon such fortuities.

From the date of occurrence until the date that petitioner filed his libel two years two months and nineteen days had elapsed. Reasonable excuse for the delay was asserted. The Court of Appeals holds that the excuse given, that a non-resident attorney had abandoned petitioner's claim, was no extenuation. It was never claimed to be.

Petitioner pleaded[35] and proved[36] that this delay did not prejudice the respondent. In the cases cited by the Court of Appeals the libellants had not successfully borne their burden of overcoming the presumption of prejudice.[37]

The trial court weighed the evidence and credibility of the witnesses and found that there had been no prejudice.[38] Without prejudice an action in admiralty cannot be barred by passage of time.[39]

This Court has delegated the responsibility of determining excusable delay and absence of prejudice to the trial court. In *Gardner* v. *Panama R. Co.*, 1951, 342 U.S. 29, 30-31, 72 S. Ct. 12, 13, 96 L. Ed. 31, it was held:

> "Although the existence of laches is a question primarily addressed to the discretion of the trial court, the matter should not be determined merely by a reference to and a mechanical application of the statute

[35] Record, page 7.

[36] Record, pages 25-26, Record 103-115, Respondent's exhibits 9 and 10; Record 151-153.

[37] *Wilson* v. *Northwest Marine Iron Works*, 9 Cir., 1954, 212 F.2d 510; *Marshall* v. *International Mercantile Marine Co.*, 2 Cir. 1930, 39 F.2d 551; *McGrath* v. *Panama R.R.*, 5 Cir., 1924, 298 Fed. 303.

[38] Finding of Fact number 16, Record, page 19, Conclusion of Law, number 9, Record, page 21.

[39] *Gardner* v. *Panama R. Co.*, 1951, 342 U.S. 29, 72 S. Ct. 12, 96 L. Ed. 31; *Claussen* v. *Mene Grande Oil Company*, C.A., 3 Cir. 1960, 275 F.2d 108; *McDaniel* v. *Gulf & South American Steamship Co.*, 5 Cir., 1955, 228 F.2d 189.

> of limitations. The equities of the parties must be considered as well. Where there has been no inexcusable delay in seeking a remedy and where no prejudice to the defendant has ensued from the mere passage of time, there should be no bar to relief."

In *Wounick* v. *Pittsburgh Consolidation Coal Company*, 3 Cir., 1960, 283 F.2d 325, a case filed after the expiration of the Jones Act limitation, the Court of Appeals reversed a dismissal based on the mechanical application of the statute of limitations. After remand, the District Court, in finding no prejudice, pointed out that:

> "The respondent did have a list of possible witnesses of the accident from the day of its occurrence and afterwards. At this time all of the witnesses to the accident and the incident surrounding the accident were available to the respondent."[40]

So too, did the respondent in the case at bar have available all the possible witnesses. It chose not to interview them, even after their names were supplied in the deposition and answers to interrogatories. If by laches, one implies that a party sleeps on his rights, it was the respondent here that is guilty. There was no defense or fact relating to the accident or injuries that surprised the respondent. In fact it was the respondent itself that filed seventeen exhibits which included the names of the potential witnesses; evidence that the cargo was unseaworthy; evidence that defective cargo was discharged, that spillage occurred, and that the accident was reported and the nature of all the medical treatment.

It cannot be said that the Court of Appeals for the

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[40] *Wounick* v. *Pittsburgh Consolidation Coal Company*, D.C.W.D. Pa. 1962, 208 F. Supp. 67.

First Circuit is unfamiliar with this body of law. The decision below was rendered on April 11, 1962. On July 6, 1962, the same court delivered the opinion in *Cities Service Oil Co.* v. *Puerto Rico Lighterage Co.*, 1 Cir. 1962, 305 F.2d. 170. There, the Court held:

> "A suit in admiralty is barred by laches only where there has been *both* unreasonable delay in the filing of the libel and consequent prejudice to the party against whom the suit is brought . . . .
>
> "The delay in the commencement of the instant suit was inexcusable, but the inference of consequent prejudice to the respondent was overcome by the undisputed evidence."[41] (Emphasis supplied).

Likewise, the evidence rebutting the presumption of prejudice herein was undisputed.[42] The trouble was not that respondent was prejudiced by lack of evidence. It was prejudiced by the evidence. The evidence conclusively revealed the unseaworthy condition which proximately caused petitioner's injury. From the evidence the respondent could no more escape liability on the day of trial than it could had the case been tried the day after the occurrence. An observation of the United States Court of Appeals for the Fifth Circuit is pertinent:

> "What it (the respondent) knows is of no real help. But on this record there is no indication that if it

[41] 305 F.2d 170 at 171.

[42] In order to indicate prejudice, the Court of Appeals stated: "And while the records did in fact show spilling from the drafts, they showed none near the hatch opposite which libellant was working." This was manifest error. The witnesses testified as to the spillage and respondent's own exhibit number 12 shows broken bags in all hatches except number 5. Petitioner was working opposite number 2.

could learn more, it could extricate itself from the inexorable consequences of the American Maritime concept of seaworthiness."[43]

If there were no unseaworthy condition and no negligence as stated in the opinion below, why should laches be a "more specific difficulty?"[44] The Court of Appeals tacitly anticipated reversal of its holding as to negligence and unseaworthiness. Otherwise, the issue of laches was unnecessary to the decision.

POINT IV. THE FINDINGS OF THE DISTRICT COURT THAT THE VESSEL WAS UNSEAWORTHY, THE SHIPOWNER NEGLIGENT, AND THAT THERE WAS NO PREJUDICE TO THE RESPONDENT, WERE NOT CLEARLY ERRONEOUS.

The Findings of the District Court may not be set aside unless clearly erroneous.

McAllister v. *United States*, (1954) 348 U.S. 19, 75 S. Ct. 6, 99 L. Ed. 20.

In this particular case more than most, this doctrine warrants respect. The witnesses testified in Spanish, a language in which the trial judge is fluent. The opportunity to judge credibility and the importance of demeanor evidence is unique. Nevertheless, from an independent reading of the cold, translated record, the Court of Appeals made independent findings of fact, reversed findings of fact of the trial court which resolved conflicts in the evidence, and determined the weight to be given to exhibits as against testimonial evidence.

[43] *Vega* v. *The Malula*, 5 Cir. 1961, 291 F.2d 415.
[44] 301 F.2d 415, at page 417.

The Court below pointedly emphasizes that a bag of beans which the trial court found broke open in mid-air actually broke upon hitting the dock after a fall from mid-air. Then the Court of Appeals incurs in an error of fact by finding that no conduct in which respondent participated was responsible for the beans on the dock, completely ignoring a specific finding of the trial court and testimony by all of the fact witnesses to the effect that beans were spilling from drafts of broken bags throughout the unloading operations, and corroboration in respondent's Exhibit 10 showing broken bagged cargo.

As a basis for reversal, the Court of Appeals also relies on a prior statement of libelant, allegedly inconsistent with his testimony on trial. In so doing, the Court disregards the cross-examination to which petitioner was submitted (R. 37-38) in the presence of the trial court and which apparently clarified any inconsistency to the satisfaction of that court, and also disregards the uncontradicted and unimpeached testimony of all the other fact witnesses.

Continuing this apparent trial de novo, the appellate court finds that the memories of the witnesses had become impaired because they testified that rice and feed had also spilled from drafts, while respondent's records showed no rice or feed being discharged until after petitioner's accident. The witnesses stated the accident occurred in the afternoon. Respondent's Exhibit 2 indicated the accident occurred in the morning. Not only does the Court of Appeals vitiate the trial court's prerogative of determining the weight to be given to any particular evidence, and the comparative weight of testimonial as against documentary evidence, but it also substitutes the appellate court's conclusion for that of the trial court on a disputed issue.

On the laches issue, the Court of Appeals concluded that

the memories of the witnesses had become impaired.[45] The demeanor, the credibility and the weight to be given to the testimony was peculiarly for the trial Judge. The Court of Appeals did not conclude on this issue or any other, that there was no substantial evidence to support the conclusions of the lower court. The appellate court from its own reading of the record came to contrary conclusions. This, it has neither the right nor power to do.

> "A district court's findings of fact should be construed liberally and found to be in consonance with the judgment, so long as that judgment is supported by evidence in the record. Travelers Insurance Co. v. Dunn, 228 F2d 629 (C.A. 5, 1956). 'Whenever from facts found, other facts may be inferred which will support the judgment, such inferences will be deemed to have been drawn . . . .' Triangle Conduit & Cable Co. v. Federal Trade Commission, 168 F.2d 175, 179 (C.A. 7), affirmed sub. nom.; Clayton Mark & Co. v. Federal Trade Commission, 336 U.S. 956, 69 S. Ct. 888, 93 L. Ed. 1110 (1949)."[46]

Once again, as in *Guzman* v. *Pichirilo*, (1962, 369 U.S. 698, 82 S. Ct. 1095, 8 L. Ed. 2d 205, the Court of Appeals has departed from the standards quoted above. Reinstatement of the findings of the District Court for the District of Puerto Rico would render it unnecessary to determine most of the issues of law brought before this Court by the grant of the writ. If for no other reason than to compel compliance with judicial standards repeatedly invoked by this Court, the finding of the trial court should

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[45] In addition to its erroneous reading of the exhibits discussed under Point III, supra.

[46] *Zimmerman* v. *Montour Railroad Company*, 3 Cir. 1961, 296 F.2d 97; also, *Blumenthal* v. *United States*, 3 Cir., 1962, 306 F.2d 16.

be reinstated. However, one issue, whether unseaworthiness extends to shore-based longshoremen should finally be resolved by this Court now.

It was thought that this issue had been laid to rest by the decision in *Strika* v. *Netherlands Ministry of Traffic*, 2 Cir. 1950, 185 F2d 555, and by the subsequent denial of certiorari in that case (1951), 341 U.S. 904, 71 S. Ct. 614, 95 L. Ed. 1343. By the opinion below, an irreconcilability of viewpoints as to the correct interpretation of the maritime law has arisen that can only be resolved by the Supreme Court.

There are many reasons why this Court should adopt the position taken in this matter by every federal court with the exception of the Court of Appeals for the First Circuit. One reason stands out above all others—there is no legal or logical distinction between classes of longshoreman performing the traditional duties of seamen. The petitioner herein was performing duties as vital to the discharge of cargo as those of the other longshoremen aboard. One could not discharge cargo without him to disengage it from the winch hook any more than one could discharge cargo without men aboard to load the drafts. If humanitarian justice underlies the doctrine of seaworthiness, it requires the inclusion of the petitioner within that doctrine and a reversal of the decision on appeal.

Conclusion

The findings of the trial court, and the decree in favor of the petitioner against the respondent based on these findings should be reinstated. The decision of the United States Court of Appeals for the First Circuit wherein it held that the seaworthiness doctrine did not apply to shore-based longshoremen should be reversed.

Respectfully submitted,

HARVEY B. NACHMAN
Counsel for Petitioner

HARVEY B. NACHMAN
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Of Counsel.

IN THE

Supreme Court of the United States

October Term, 1962.

No. 229.

FEDERICO MARIN GUTIERREZ,
Petitioner,

v.

WATERMAN STEAMSHIP CORP.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit.

MOTION AND BRIEF OF AMICI CURIAE, ELLERMAN & BUCKNALL STEAMSHIP COMPANY, LTD. AND CALMAR STEAMSHIP CORPORATION, IN SUPPORT OF RESPONDENT.

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INDEX.

TABLE OF CASES CITED.

TABLE OF CASES CITED (Continued).

STATUTES AND AUTHORITIES CITED.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1962.

No. 229.

FEDERICO MARIN GUTIERREZ,
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v.

WATERMAN STEAMSHIP CORP.,
Respondent.

MOTION OF ELLERMAN & BUCKNALL STEAMSHIP COMPANY, LTD. AND CALMAR STEAMSHIP CORPORATION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE.

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Ellerman & Bucknall Steamship Company, Ltd. and Calmar Steamship Corporation respectfully move this Court for leave to file the accompanying brief as *amici curiae* supporting respondent in the above-entitled action, and submit that they satisfy the requirements respecting eligibility for such leave provided in Rule 42 of this Honorable Court on the grounds stated hereafter. The consent of respondent has been obtained. The consent of petitioner was requested but refused.

Nature of Movants' Interest.

Ellerman & Bucknall Steamship Company, Ltd. is a British corporation which owns a large fleet of ocean-going

cargo vessels which regularly call at United States ports. It is also the defendant in *Hagans v. Ellerman & Bucknall S. S. Co.* (D. C., E. D. Penna., 1961), 196 F. Supp. 593, which was argued on appeal before the Court of Appeals for the Third Circuit on October 4, 1962.

The *Hagans* litigation involves injuries sustained by a longshoreman working inside a pier. Hagans slipped on the pier floor on sand which had escaped from bags which the defendant shipowner had carried. Having been held liable in the District Court the shipowner appealed, contending, inter alia, that Hagans' cause of action did not constitute a maritime tort; that a finding of unseaworthiness could not be based upon deficiency of the cargo containers; and that the shipowner did not owe Hagans a duty to provide a safe place to work upon the pier which it neither owned, operated nor controlled.

On appeal, defendant cited the opinion of the Court of Appeals for the First Circuit in the instant case in support of its position. The Court of Appeals for the Third Circuit was also informed of the filing of the petition for a writ of certiorari herein. The Third Circuit has not as yet decided the *Hagans* appeal. Ellerman & Bucknall Steamship Company, Ltd. believes that the decision of this Court in the instant case may or will control the decision of the Third Circuit in the *Hagans* case.

Calmar Steamship Corporation is a domestic corporation which operates a fleet of cargo vessels in the United States inter-coastal trade. It is also the defendant in *Thompson v. Calmar Steamship Corporation* (Civil Action No. 26,450), now pending in the United States District Court for the Eastern District of Pennsylvania. The *Thompson* case involves injuries sustained on a pier by a longshoreman who fell from a moving railroad car containing cargo scheduled for loading aboard defendant's vessel. Defendant was held liable at the trial; post-trial motions have been filed by defendant and are awaiting de-

cision. Calmar Steamship Corporation believes that the decision in the instant case may or will control the decision in the *Thompson* case.

Apart from the specific litigation described above, movants have, generally, a deep and legitimate interest and concern in the outcome of the instant case. Both of them employ stevedoring contractors whose employees are regularly called upon to work on piers. The fundamental issues involving a vessel owner's liability to persons so situated, now presented to this Court for decision, are therefore most important in the daily operations of both movants. Also, to the extent that the question of a vessel owner's liability arising from defective cargo or cargo containers is here presented, future relationships between movants and those whose cargo they transport will be directly and materially affected.

Reasons for Submission of Brief.

Movants desire to support respondent. Petitioner's brief has been examined. Respondent's brief is not as yet available. However, counsel for movants have studied all available documents in the instant case, as well as the relevant authorities. On this basis, movants believe that certain important and relevant questions of law may not be fully covered in respondent's brief.

Movants believe that there is an important underlying jurisdictional question in this case. The parties have proceeded on the basis that this controversy is within the admiralty and maritime jurisdiction, and that consequently, the general maritime law applies. Existence of that jurisdiction was admitted in respondent's answer (R. 10). Nevertheless, movants believe it proper at any stage of a proceeding to invite the Court's attention to a possible lack of jurisdiction of the subject matter—particularly where, as here, the applicability of the principles under discussion depends upon the existence of that jurisdiction.

Movants therefore desire to discuss the jurisdictional question, so that its existence will at least be noted in the process of decision. Otherwise consideration of this fundamentally important issue may be aborted for lack of discussion from any source, resulting in a decision binding in future cases where jurisdiction would otherwise be controverted.

It is also believed that issues of wide importance relating to unseaworthiness based upon the condition of cargo, and a vessel owner's duty to provide longshoremen a safe place to work on a pier which it neither possessed nor controlled, nor had any right to do so, are involved in the instant case. Obviously a decision on these points will have an impact far beyond the confines of this case. Movants believe that these issues may not be fully presented in respondent's brief.

It has not been feasible to present this motion at an earlier date due to the necessity for studying all available documents and determining the position of counsel for the parties concerning this application.

For the foregoing reasons it is respectfully requested that leave be granted to file the accompanying brief as *amici curiae*.

Respectfully submitted,

T. E. Byrne, Jr.,
Mark D. Alspach,
21 South Twelfth Street,
Philadelphia 7, Pa.,
Counsel for Ellerman & Bucknall Steamship Company, Ltd. and Calmar Steamship Corporation.

BRIEF OF ELLERMAN & BUCKNALL STEAMSHIP COMPANY, LTD. AND CALMAR STEAMSHIP CORPORATION AS AMICI CURIAE.

The Interest of Ellerman & Bucknall Steamship Company, Ltd. and Calmar Steamship Corporation as Amici Curiae.

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ARGUMENT.

Summary of Argument.

This tort claim is not within the admiralty and maritime jurisdiction of the United States, either as historically defined by decisional law, or as extended by the Extension of Admiralty Jurisdiction Act, 46 U. S. C. Sec. 740.[1] Therefore principles of the general maritime law should not furnish the rules of decision or measure petitioner's right to recover. Accordingly, recovery should not be allowed on the ground of unseaworthiness or on the ground of respondent's failure to furnish petitioner a reasonably safe place to work. If the existence of admiralty jurisdiction were either directly or inferentially sustained here, the result would be to destroy the settled definition of the extent of that jurisdiction, and to invade the local law in a manner never intended by Congress.

Even if admiralty jurisdiction existed and the general maritime law were applicable, it affords no basis for petitioner's recovery on the ground of unseaworthiness. Insufficient or deficient packaging of cargo has never been held to render a vessel unseaworthy, or to constitute unseaworthiness in and of itself. A vessel owner does not warrant to longshoremen that it will furnish cargo which is safe to handle.

Nor was respondent under any obligation to furnish petitioner with a safe place to work on the pier. No authority supports the proposition that a party is responsible for the safety of premises in the absence of ownership or a right, whether exercised or not, to possession or control.

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1. Act of June 19, 1948, c. 526, 62 Stat. 496.

I.

This Controversy Is Not Within the Admiralty and Maritime Jurisdiction of the United States. The General Maritime Law Is Inapplicable.

The admiralty and maritime jurisdiction of this case is admitted in respondent's answer (R. 10). However, since jurisdiction can never be assumed nor conceded, and may be determinative in other situations on a different record, it is deemed necessary to make certain points.

Petitioner's right to recover is assertedly based upon principles of the general maritime law—i.e., breach of the warranty of seaworthiness, and respondent's failure to furnish petitioner a reasonably safe place to work. It is the existence of admiralty and maritime jurisdiction, and nothing else, which empowers the Federal Courts to create and apply the rules of decision collectively called the general maritime law. As this Court pointed out in *Romero v. International Terminal Operating Co.*, 358 U. S. 354, 360-361, Article III, Section 2, Clause 1, of the Constitution "empowered the Federal Courts in their exercise of the admiralty and maritime jurisdiction which had been conferred on them, to draw on the substantive law 'inherent in the admiralty and maritime jurisdiction', *Crowell v. Benson*, 285 U. S. 22, 55, and to continue the development of this law within Constitutional limits".

The present controversy is not within the admiralty and maritime jurisdiction. A decision impliedly upholding the existence of admiralty and maritime jurisdiction would raise serious questions which should be recognized beforehand.

Petitioner did not prove a maritime tort. His accident occurred on the pier. With respect to torts, it has been uniformly held that it is the locality, or situs, of the substance and consummation of the wrong which determines whether the matter is a maritime tort—i.e., one cognizable

under the admiralty and maritime jurisdiction. *Benedict on Admiralty*, Volume 1, p. 2.

The pier is an extension of the land; it is beyond the admiralty and maritime jurisdiction and local law applies to causes of action arising thereon. *Cleveland Terminal v. Cleveland S. S. Co.*, 208 U. S. 316; *Industrial Commission v. Nordenholt*, 259 U. S. 263; *Smith & Son v. Taylor*, 276 U. S. 179; *The Plymouth*, 3 Wall. 20, 33. It is therefore clear that petitioner's cause of action did not constitute a maritime tort. *Robinson on Admiralty*, p. 76; Gilmore and Black, *The Law of Admiralty*, p. 18; *Benedict on Admiralty*, Volume 1, p. 353.

The Extension of Admiralty Jurisdiction Act, 46 U. S. C. Sec. 740,[2] did not alter these principles in any relevant sense. This statute extended the admiralty and maritime jurisdiction of the United States to cases of injury to persons "*caused by a vessel* on navigable water, notwithstanding that such damage or injury be done or consummated on land." (Emphasis supplied.)

This statute did not change the basic concept of locality, or situs in fixing the boundaries of the admiralty and maritime jurisdiction in tort cases. It simply included within the jurisdictional locale injuries sustained ashore in instances where *a vessel* on navigable water is the responsible instrumentality. That the Extension Act does not bring this case within the admiralty and maritime jurisdiction is clear from its legislative history and under the decided cases.

By no stretch of reasoning was petitioner's injury caused by a vessel on navigable water. His injury was not caused by any vessel anywhere. Nor were the bags from which the beans escaped appliances or appurtenances of any vessel. The vessel's only connection with the bags was that she had previously transported them as a common carrier by water. They were no more a part of the vessel than are passengers part of a passenger train.

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2. Act of June 19, 1948, c. 526, 62 Stat. 496.

The legislative history of the Extension Act makes it plain that it does not apply to the present case. See Senate Report No. 1593 in Volume 1, U. S. Code Congressional Service (80th Congress, 2nd Session, 1948), p. 1898. The Report makes it clear that the extension of jurisdiction intended by Congress pertained solely to damage to a person or structure ashore *caused by a vessel* in navigable water. Indeed, the main thrust of the statute was to afford a remedy in admiralty to owners of shore structures which had been struck by a vessel.

The decided cases hold that the Extension Act is to be construed as written. In *Clinton v. Joshua Hendy Corporation* (C. A. 9, 1960), 285 F. 2d 199, the complaint alleged that defendant's Chief Mate sent a libelous letter to plaintiff-seaman's union. The letter was written and published on the ship to agents of plaintiff's union. Plaintiff was expelled from his union and brought suit for tortious interference with his contractual relations. The court held that jurisdiction could not be sustained under the Admiralty Extension Act, saying:

> ". . . The vessel itself, in the case at bar, was not involved in the alleged tort; it was only a fortuitous circumstance that the allegedly libelous letter was written on the decks of the ship rather than in appellee's on-shore offices." (at p. 201)

The court further held that the language of the statute and the relevant legislative history was convincing that:

> ". . . Congress did not intend to extend admiralty jurisdiction to a case such as this one. The committee reports and accompanying letters are concerned largely with damage to land structures caused by ships on navigable waters. In our view, the statute should not be construed to confer admiralty jurisdiction over on-shore injuries *unless the vessel itself or some accessory of it* is directly involved . . .". (at pp. 201-202; emphasis in original)

In *Kent v. Shell Oil Company* (C. A. 5, 1961), 286 F. 2d 746, a truck driver unloading pipe into a barge by means of "skids" was injured when struck by a piece of the pipe. The District Court refused to charge on unseaworthiness. The Court of Appeals held that the refusal was proper, saying:

> ". . . But the cause of the injury in no sense could be attributed to the vessel or its appurtenances, even if it is assumed that skids were part of the barge's equipment through judicial adoption . . . This means that the 'injuries' were non-maritime in nature. The extension of admiralty jurisdiction statute, 46 U. S. C. A. Sec. 740, does not therefore make a classic non-maritime, land-based injury into something else." (at p. 750)

In *Salmond v. Isbrandtsen Co., Inc.*, 144 N. Y. S. (2nd) 578, 1955 A. M. C. 2334, chunks of concrete ballast were being removed from a vessel by a contractor. A cracked chunk broke while suspended in mid-air, injuring a workman ashore. It was held that the case was not governed by the maritime law because the injury was not "caused by a vessel".

Thus it is clear that even under the Extension Act, an injury to a person ashore does not constitute a maritime tort unless the injury is inflicted by a vessel, or her equipment or appliances. Consistent with this principle, and clearly distinguishable from the present case, are the decisions relied on by petitioner such as *Strika v. Netherlands Ministry of Traffic* (C. A. 2, 1950), 185 F. 2d 555, and *Hagans v. Farrell Lines, Inc.* (C. A. 3, 1956), 237 F. 2d 477. In both of these cases a person ashore was injured by the vessel's malfunctioning appliances.

Certainly it does not strain logic to say that a "vessel" includes her equipment and appliances; nor is a jurisdictional test based on that definition difficult to apply. The Extension Act, thus construed so as to confine the Con-

gressionally conferred jurisdiction, would raise no serious Constitutional questions. It is when the definition is distorted in an effort to bring something never intended by Congress within the Extension Act that serious questions arise. That is what petitioner attempts to do here. He suggests, in effect, that he can recover on principles of the general maritime law because of his "status"—i.e., because he is a longshoreman engaged in cargo discharge. In petitioner's view, "status" would presumably supplant locality, or situs, as the test of admiralty jurisdiction in tort cases.

If it were held that this case is within the admiralty and martime jurisdiction, the end result would be the destruction of jurisdictional lines clearly laid down by this Court in decisions stretching over more than a century and never heretofore seriously questioned. The lines this Court had thus drawn were certainly understood by Congress when it passed the Extension Act. Any new definition now would be in derogation of the clear intendment of that statute.

The jurisdictional complications inherent in petitioner's position can be readily illustrated in terms of his theories of recovery. Petitioner asserts liability on two grounds: negligence and unseaworthiness. The negligence claim is based on fault of the vessel's officers in permitting the cargo to be discharged and/or in failing to provide petitioner with a safe place to work on the pier.

Implicit in petitioner's argument is the proposition that where negligence of a vessel's officers results in injury to persons ashore, admiralty jurisdiction exists under the Extension Act. If this is so, what are the physical boundaries of that jurisdiction? Let us suppose that a vessel's officer is dispatched ashore with an automobile on ship's business and negligently injures a pedestrian. Would petitioner suggest that the injured could bring suit in admiralty and recover under principles of the maritime law—or would he restrict the existence of admiralty jurisdiction to in-

stances where the victim happened to be a "longshoreman"?

Clearly, any distinction based upon the identity of the victim is untenable. The Extension Act does not create any preferred class of beneficiaries. It is a jurisdictional statute of general application.

It is not suggested that persons injured under the above-described circumstances have no remedy. However, discussion of the local law is presently beside the point. The point is that Congress did not intend an extension of the admiralty jurisdiction to cases such as this. Once it is assumed that admiralty jurisdiction exists where a person is injured ashore by the negligence of ship's personnel, the limits of the jurisdiction become practically indefinable.

Nor can recovery on the ground of unseaworthiness be supported from a jurisdictional standpoint. Petitioner speaks interchangeably of unseaworthiness of the ship, unseaworthy cargo, and, more vaguely, an "unseaworthy condition".

Regardless of terminology, the fact remains that viewing the situation most favorably to petitioner, his injury resulted from leakage of the contents from bags of cargo which had been the subject of common carriage by water by respondent. Even if unseaworthiness were postulated, it does not breed admiralty jurisdiction here. If it did it would follow that this cargo could roam about anywhere, spilling out admiralty jurisdiction along with the beans wherever harm ensues—even, as the Court of Appeals observed, on a warehouse floor in Denver.

No attempt will be made to refine further the jurisdictional propositions inherent in petitioner's position. From what has been said, it is obvious that an assertion of admiralty jurisdiction in this case will not withstand analysis. The novel consequences flowing from assertion of admiralty jurisdiction here point more strongly toward the conclusion that the Extension Act should be construed as written. When a vessel, her appliances or equipment causes injuries

ashore, the controversy is within the admiralty jurisdiction. Otherwise, it is not.

For these reasons, petitioner's injury did not constitute a maritime tort and his right to recover should not be measured by the substantive principles of the general maritime law.

II.

Unseaworthiness Cannot Be Predicated Upon the Condition of the Cargo.

Petitioner's argument based on unseaworthiness is elusive. In different contexts, petitioner speaks of unseaworthiness of the ship, unseaworthiness of the cargo, and, more loosely, an undefined "unseaworthy condition". Certainly no clear analysis can be made of the problem for decision unless terms are defined, and the entity under discussion is plainly identified.

Unseaworthiness of the ship, as a ground for liability, does not exist here. The classic definition of unseaworthiness is insufficiency of the vessel, her equipment or appliances. As this Court pointed out in *West v. United States*, 361 U. S. 118, in cases where recovery by shoreside workers has been sustained, "The workmen, like the seamen, depended upon the fitness of the ships, their equipment, and gear. They were obliged to work with whatever the ship owner supplied and it was only fair for the latter to be subjected to the absolute warranty that the ships were seaworthy . . ." (at 361 U. S. 121). See also *Brabazon v. Belships Co.* (C. A. 3, 1953), 202 F. 2d 904, 908.

In *Kent v. Shell Oil Company* (C. A. 5, 1961), 286 F. 2d 746, the Court, denying the applicability of the seaworthiness doctrine, said:

> ". . . But the cause of the injury in no sense could be attributed to the vessel or its appurtenances, even

> if it is assumed that the skids were part of the barge's equipment through judicial adoption . . .". (at 286 F. 2d 750)
>
> The court further pointed out that
>
> ". . . where the injuries are sustained wholly ashore and are caused by a thing not a part of the vessel or its appurtenances, the failure or deficiency of such facility is not deemed either to constitute unseaworthiness or give rise to any recovery under the doctrine of seaworthiness. Fredericks v. American Export Lines, 2 Cir., 1955, 227 F. 2d 459, 454, 1956 A.M. C. 57." (at p. 752)

It is true that the historical concept of unseaworthiness has been judicially broadened to include unseaworthiness of *a vessel* resulting from improper stowage of cargo. Where cargo is stowed improperly aboard the vessel, that can render the vessel itself unseaworthy as to a longshoreman injured by reason of the improper stowage. *Gindville v. American-Hawaiian Steamship Co.* (C. A. 3, 1955), 224 F. 2d 746; *Palazzolo v. Pan-Atlantic S. S. Corp.* (C. A. 2, 1954), 211 F. 2d 277; *Curtis v. A. Garcia y Cia.* (C. A. 3, 1957), 241 F. 2d 30, 34; *Rich v. Ellerman & Bucknall S. S. Co.* (C. A. 2, 1960), 278 F. 2d 704.

Here it is contended that unseaworthiness arises from the condition of the cargo itself. This is a totally different proposition. Unseaworthiness of a vessel stemming from improper stowage of cargo has nothing to do with the integrity of cargo containers.

Cargo which has been the subject of common carriage by water is not impressed with any separate warranty of seaworthiness. Or, to put it differently, a vessel does not warrant to a longshoreman that the cargo is safe to handle.

In *Carabellese v. Naviera Aznar, S. A.* (C. A. 2, 1960), 285 F. 2d 355, cert. den. 365 U. S. 872, a longshoreman working aboard a vessel was injured when a large crate being loaded toppled and fell on him. He asserted as error the court's refusal to charge "that the top heaviness or

instability of the case of cargo on the vessel would in itself be sufficient to prompt unseaworthiness" (at p. 359).

After discussing various types of unseaworthiness, the court noted that in each of them

> ". . . the defect that caused the injury related either to the vessel itself or to 'the proper appliance appurtenant to the ship,' The Osceola, 1903, 189 U. S. 158, 175, 23 S. Ct. 483, 487, 47 L. Ed. 760, whereas here the alleged defect was in a piece of cargo . . ." (at p. 359)

The court pointed out the distinction between stowage of the cargo and the condition of the cargo itself and concluded that although there may have been a valid claim of unseaworthiness had the crate been improperly stowed and had fallen on the plaintiff as he undertook some later operation, nevertheless

> ". . . we know of no case that has imposed absolute liability on the owner where the alleged danger was inherent in the cargo and this was still in the course of being loaded. Hence the question posed is whether the owner warrants to longshoremen not simply a safe place in which to handle cargo but cargo which is safe to handle.
>
> "We are not disposed so to extend the doctrine, at least on the facts here. Almost any cargo presents some hazard in handling . . .". (at pp. 359-360)

In *Freeman v. A. H. Bull S. S. Co.* (C. A. 5, 1942), 125 F. 2d 774, recovery was denied for the death of a longshoreman resulting from noxious gases emanating from the cargo. In that case the injury and death actually occurred aboard the vessel. The court said "The fault here was not with the vessel, but in the cargo" (at p. 775).

In *McMahan v. The Panamolga,* 127 F. Supp. 659, 670, the court stated that it had been referred to no case, nor

could it find any "which extends the warranty of seaworthiness to the condition or ingredients of cargo being loaded onto the ship by stevedore's employees". The court then held that there was no such warranty.

In *Cornec v. Baltimore & Ohio R. Co.* (C. A. 4, 1931), 48 F. 2d 497, cert. den. 284 U. S. 621, a case frequently cited and relied upon in recent years by this Court (cf. *Weyerhaeuser S. S. Co. v. Nacirema Operating Co., Inc.*, 355 U. S. 563), there was an explosion aboard ship resulting from ignition of dust from a cargo of pitch. The case would not have been decided the way it was if there had been any warranty by the shipowner with respect to the cargo.

Therefore, even if the general maritime law were applicable, unseaworthiness liability based on the condition of the cargo containers should not be recognized here.

III.

Respondent Cannot Be Held Liable for Negligence in Failing to Provide Petitioner With a Safe Place to Work.

Petitioner's argument based on negligence includes the contention that respondent owed petitioner the duty to provide a safe place to work. Petitioner asserts that respondent's duty is unaffected by the fact that respondent neither controlled, nor had the right to control the locus of injury.

Petitioner has not cited and cannot cite any case for the proposition that a shipowner owes a duty to provide a longshoreman with a safe place to work on a pier which the shipowner neither owned, possessed nor controlled. Contrary to petitioner's assertion, liability for failure to provide a safe place does stem from possession and control of the premises. Even as to shipboard injuries, lack of control of the vessel insulates the vessel owner from this species of liability.

In *West v. United States*, 361 U. S. 118, this Court denied recovery to a shoreside worker assisting in pre-

paring a vessel for return to active service. Holding that the vessel owner could not be liable for failure to furnish a safe place to work, this Court said:

> "Petitioner overlooks that here the respondent had no control over the vessels, or power either to supervise or to control the repair work in which petitioner was engaged . . . It appears manifestly unfair to apply the requirement of a safe place to work to the shipowner when he has no control over the ship or the repairs, and the work of repair in effect creates the dangor which makes the place unsafe . . .". (at p. 123)

The Third Circuit has also held that control is a necessary ingredient of the liability. In *Brabazon v. Belships Co.* (C. A. 3, 1953), 202 F. 2d 904, disposing of the vessel owner's defense that the hazard arose during the longshoreman's operations, it was said:

> ". . . The owner who retains control of the vessel as a whole and general supervision of what is being accomplished by an independent contractor in one part of the vessel is not relieved of all responsibility in connection with the prevention, discovery or correction of new hazards which may make the area temporarily used and occupied by independent contractors an unsafe place to work . . .". (at p. 906)

Marceau v. Great Lakes Transit Corporation (C. A. 2, 1945), 146 F. 2d 416, relied on by petitioner, actually supports the view that control of the premises is necessary to support a duty to provide a safe place to work. In *Marceau*, the injured plaintiff was a crew member employed by the defendant, so that liability stemmed in the first instance from the Jones Act.[3] More importantly, the defendant in *Marceau* was the lessee in possession of the pier. In upholding liability, the Court said:

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3. Act of June 5, 1920, c. 250, Sec. 33, 41 Stat. 1007, 46 U. S. C. Sec. 688.

". . . Consequently at the time of the accident he was not only acting in the course of his employment but suffered his injuries while on property *in the possession and under the control* of the defendant as lessee . . ." (at 146 F. 2d 418; emphasis supplied)

Nor does *Imperial Oil Limited v. Drlik* (C. A. 6, 1956), 234 F. 2d 4, support petitioner's contention. The defendant's liability for negligence was not disputed in *Drlik*; the only point decided was the availability of the defenses of assumption of risk and contributory negligence (at 234 F. 2d 9).

Hagans v. Ellerman & Bucknall S. S. Co., 196 F. Supp. 593, does not attempt to analyze the correctness of imposing liability for failure to provide a safe place to work upon a party who had neither possession nor control of the premises. It would appear from petitioner's quotation (Brief, p. 23) that in *Hagans*, the defendant admitted the existence of the duty. While this was not so (a point urged on appeal before the Third Circuit), the point is that the liability was assumed to exist, rather than decided, in *Hagans*.

In summary, no decided case supports petitioner's contention that control of the premises is irrelevant for purposes of imposing liability upon a shipowner for failure to provide a longshoreman with a safe place to work on the pier. The controlling authorities cited above look in the opposite direction, consistently with fundamental principles of tort law.

CONCLUSION.

Each of the points discussed in this brief is directly involved in the present decision, and merits the serious consideration of this Court. Acceptance of petitioner's contentions would result in a new and different test for the existence of admiralty jurisdiction and, consequently, the applicability of the general maritime law; the creation

of a new species of unseaworthiness liability; and the imposition of a novel type of negligence liability against one who had neither ownership, nor even the right to possession or control of the premises. The decision below should be affirmed.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 229

FEDERICO MARIN GUTIERREZ,
PETITIONER,

v.

WATERMAN STEAMSHIP CORP.,
RESPONDENT.

BRIEF FOR RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES CITED

Miscellaneous

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BRIEF FOR RESPONDENT

Statement of the Case

Respondent adds to petitioner's statement that beans fell on the apron prior to petitioner's injuries when a bag fell from a pallet in midair and broke upon falling to the ground.

Petitioner took his orders solely from his employer, the independent stevedoring contractor; he had no contract whatsoever with any of the vessel's owners or agents. The area where petitioner was working was owned, managed, operated and under the possession and control of an entity not involved in the suit.

Argument

Point One

The District Court Lacked Jurisdiction

Inasmuch as the Trial Court in its Conclusion of Law No. 1 (R. 18) found that its jurisdiction is based on the Extension of Admiralty Jurisdiction Act; 46 U.S.C.A. 740, we address ourselves first to the fundamental question of whether the general maritime law can be applied to this case. If it cannot, that ends the controversy and the decision of the Circuit Court must be affirmed.

Marin's injuries were consummated on land. It has long been established that a pier is an extension of the land and beyond the admiralty and maritime jurisdiction. *Cleveland T. & V. R. Co.* v. *Cleveland Steamship Co.*, 208 U.S. 316, 52 L. ed. 508 (1908); *State Industrial Commission* v. *Nordenholt Corp.*, 259 U.S. 263; 66 L. ed. 933 (1922). State law applies to an accidental injury occurring upon a pier. *Smith & Sons* v. *Taylor*, 276 U.S. 179, 72 L. ed. 520 (1928); *The Plymouth*, 3 Wall. 20; 70 L. ed. 125 (1886).

With respect to torts, it is the locality of the substance and consummation of the wrong which determines whether admiralty jurisdiction exists. Benedict on Admiralty, Vol. 1, Page 2. Since Petitioner's injuries were sustained on land, there is no admiralty jurisdiction and there is no basis for application of the general maritime law to his action against respondent unless his claim is covered by the Extension Act. This Act extended the jurisdiction of the United States to cases of injury to persons "caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land".

It is plain from the legislative history of the Admiralty Extension Act that this statute does not give petitioner a cause of action against respondent. (See Senate Report

No. 1593 in Vol. 2, United States Congressional Service (80th Congress, 2d Session, 1948), page 1898.) The report makes it clear that the extension of jurisdiction intended by Congress pertained solely to damage or injury to a person or a structure ashore caused *by a vessel* on navigable water, the Extension Act does not apply.

Petitioner was not injured by the vessel. It was not the vessel which failed to discover the spilled beans on the apron, or to take corrective action. The Court did not find, nor could it have found, that the broken bags were appliances or appurtenances of the vessel. The only connection between the bags and the vessel was that the vessel had previously transported them as a common carrier by water. Under these circumstances, there is no basis whatever for suggesting that an injury traceable, causally, to broken bags, was caused by the vessel itself within the meaning of the Extension Act. For the above reasons it must be concluded that the District Court lacked jurisdiction under the Extension Act.

Point Two

Petitioner Is Not Entitled to the Protection Afforded to Seamen Under the Doctrine of Seaworthiness.

The thrust of petitioner's argument to support his claim that he is entitled to recover under the doctrine of seaworthiness is that the cargo was unseaworthy because broken bags had been discharged from the vessel and spilled on the apron. We have not been able to find a case holding that a vessel is unseaworthy because the cargo was not safe to be handled by the longshoremen. There is no claim that the cargo was improperly stowed aboard the vessel. The only claim is that because beans were spilled on the dock the vessel was unseaworthy.

Seas Shipping Co. v. Sieracki, 328 U.S. 85, 90 L. ed. 1099 opened the doors to actions by longshoremen to recover for injuries suffered as a result of the unseaworthiness of a vessel. In that case, the vessel's liability was predicated on the theory that the injured longshoreman was performing a task *on board the vessel* which would historically have been performed by a crew member. The imposition of liability without fault on the ship owner was justified on the ground, among others, that the independent stevedoring contractor, who was Sieracki's employer, "ordinarily has neither right nor opportunity to discover or remove the cause of the peril and it is doubtful, therefore, that he owes to his employees, with respect to these hazards, the employer's ordinary duty to furnish a safe place to work, unless perhaps in cases where the perils are obvious or his own action creates them. If not, no such obligation exists unless it rests upon the owner of the ship".

The decision contains a footnote which reads as follows: "In this case we are not concerned with the question of whether the same policy extends to injuries incurred ashore by a stevedore engaged in the same work (328 U.S. 99, 90 L. Ed. 1109)."

Liability in *Sieracki* was justified under the theory that the Master has always control over the whole vessel and his crew even when they are on shore. In the case of a longshoreman working aboard the vessel, the Master has the right of control of everything that is going on board the vessel. If beans had been spilled inside the hold of the vessel the Master would have had the right or even the obligation of ordering that they be swept. Petitioner was working on an area over which the Master of the vessel had absolutely no right to instruct petitioner's employers as to how the work should be performed and as to what

steps should be taken to insure the safety of the men working on the dock.

Petitioner relies strongly on the several cases, commencing with *Strika* v. *Netherland Ministry of Traffic*, 185 F.2d. 555 (C.A. 2, 1950, cert. denied 341 U.S. 904), which extended the liability of a vessel to the case of longshoremen injured on the dock because of some conditions directly connected to the vessel.

There is a clear distinction between those cases and petitioner's claim. In *Strika*, the longshoreman was injured while on the dock, when a hatch cover fell on him because of the failure of the ship's tackle.

In *Pope & Talbot, Inc.* v. *Cordray*, 9 Cir. 1958, 258 F.2d 214, a longshoreman was injured aboard the vessel when a block, which was part of the ship's gear, dropped and struck him on the head.

In *American Export Lines, Inc.* v. *Revel*, 4 Cir. 1959, 266 F.2d 82, a defective ship's winch caused a pallet loaded with drums to strike the side of the vessel, the drums fell to the pier and one of them injured the plaintiff.

Hagans v. *Farrell Lines, Inc.*, 3 Cir. 1956, 237 F.2d holds that a longshoreman standing on the dock and struck by a draft of cocoa beans because of a defective ship's winch, is entitled to recover.

The above cases are clearly distinguishable from the one under discussion. In every one of them the injury was directly caused by some defect in the ship's gear. Petitioner was injured because of a condition created on land by his employer in an area over which the vessel owner had no control.

On the other hand, the Second Circuit has held that a longshoreman engaged in discharging cargo from a vessel and injured on the pier as a result of a defective skid furnished by his employer, the independent stevedoring contractor, and used for the discharging of cargo from the

ship to the dock, is not entitled to recover under the doctrine of seaworthiness. *Fredericks* v. *American Export Lines*, 227 F.2d. 450 (C.A. 2d, 1955). In denying recovery the Court states:

> "Finally, while in recent years the warranty of seaworthiness has been held by the Supreme Court to cover a pretty wide territory . . . , nevertheless, here the injury was incurred by a longshoreman standing on a pier, as a result of the failure of a defective appliance located on the pier and furnished by a subcontractor. *No decision so far has extended the sweeping protection of the seaworthiness doctrine to this situation.* No vessel was connected with the accident."

Had the longshoreman's employer taken the defective appliance aboard the vessel, there is no doubt that under the doctrine established in *Petterson* v. *Alaska SS Co., Inc.*, 9 Cir., 1953, 205 F.2d. 478, affirmed 347 U.S. 396, he would be entitled to recover because of the unseaworthiness of the vessel, created by the defective equipment.

It is apparent that the justification for imposing liability under *Sieracki*, *Strika*, and other cases cited by petitioner are not existing in this case. As pointed above, in *Sieracki* the Supreme Court stressed the inability of the stevedore to discover or remove the unseaworthy condition. The Master is always the ultimate authority aboard the vessel, but his authority does not extend to conditions existing on the pier under the exclusive control of another party. The condition of the beams on the dock were evident and known to the stevedoring contractor and to the petitioner but were unknown to the respondent. If any one had the right or opportunity to avoid the risk and to correct the condition it was petitioner's employer and not the respon-

dent. The respondent did not have the duty nor the opportunity to sweep the floor where petitioner was working.

Point Three

Respondent Was Not Negligent

Petitioner contends that respondent was under the duty of providing him with a safe place to work notwithstanding the fact that respondent had neither control of nor even right to control the pier where petitioner was injured; yet petitioner fails to cite a case in point.

Marceau v. *Great Lakes Transit Corp.*, 2 Cir. 1945, 146 F.2d 416, on which petitioner relies, holds that a seaman is entitled to the remedies of the Jones Act (46 U.S.C. 688) even if his injuries were suffered on shore, because at the time of the occurrence the seaman was in the ship's service and the dock where he was injured was under the possession and control of the ship owner.

In *Imperial Oil, Limited*, v. *Drlik*, 6 Cir. 1956, 234 F.2d 4, contrary to what is stated by petitioner, the plaintiff was not a longshoreman. He was an employee of an entity performing repairs to the vessel and was assisting the ship in unlocking at the time of the injury. The mooring cables were running from the ship's winches and tied to spiles on shore. The tightening of the cables was done by means of the winch operated by a member of the vessel's crew who, without warning, set the winch in motion, causing one of the mooring cables to become taut and injuring the plaintiff who was handling the mooring lines on shore. The court found that the ship owner had been negligent in not having some one coordinating the work of the crew member on board the vessel with that of the plaintiff on shore.

Beard v. *Ellerman Lines, Ltd.*, 3 Cir. 1961, 289 F.2d 201, can also be clearly distinguished. There was evidence that

the cargo was being discharged by dangerous methods, that the first officer of the vessel had observed the manner of discharging and that the vessel had failed to furnish plaintiff with a safe place to work. The longshoreman was injured aboard the vessel, and the jury found that the vessel had been negligent.

We must conclude that there was not a scintilla of evidence before the Trial Court to support a finding of negligence. There was no evidence that any officer or agent of the vessel was anywhere near the place where support any notice to respondent of the hazardous condition on the pier was created by petitioner's employer who had complete control of the area where petitioner was working.

Point IV

Petitioner Did Not Overcome the Inference That His Delay in Filing Suit Was Both Inexcusable and Prejudicial to Respondent.

The rule is well settled that laches will bar a suit in admiralty. Two elements must be present, 1) inexcusable delay in instituting suit, and, 2) prejudice resulting to the respondent from such delay. *Kane* v. *Union of Soviet Socialist Republics*, 189 F.2d 303 (C.A. 3d, 1951, cert. denied 342 U.S. 903).

In applying the doctrine of laches the Federal Courts have resorted to the analogous statute of limitations and the same practice prevails in Puerto Rico. *Guerrido* v. *Alcoa Steamship Co.*, 234 F.2d 239 (C.A. 1st, 1956).

Petitioner's injury was covered by the Puerto Rico Workmen's Compensation Act and thus the analogous statute of limitations applicable to this case is 11 L.P.R.A. 32, which provides that a suit must be instituted within one year following the date of the final decision by the Manager of the State Insurance Fund.

When laches appears from the face of the libel and it is also asserted as an affirmative defense by the respondent as in the case under discussion, then the claim is barred unless the libelant alleges and proves circumstances excusing the delay, and it is incumbent to the respondent to disprove it. *Redman* v. *United States*, 176 F.2d 713 (C.A. 2d 1949).

That laches appear from the face of the libel in this case is evident on the following undisputable facts:

(1) The accident occurred on October 21, 1956.

(2) The analogous statute of limitations would have expired on November 30, 1957.

(3) The libel was filed in the United States District Court for the Southern District of New York on January 9, 1959.

When respondent was served with the libel in New York shortly after the filing of the libel, it was then that for the first time it learned that petitioner had allegedly suffered injuries while working on the apron.

The fact that petitioner's witnesses were available three years and three months after the occurrence, that the payroll records of the stevedore indicated the potential eyewitnesses, that the accident report filed by the stevedore named the witnesses and formed part of the record of the State Insurance Fund, that respondent produced evidence indicating the cargo damaged prior to and at the time of the discharge, that medical records indicating treatment and the names of the treating physicians were available, and that the respondent took petitioner's deposition and submitted interrogatories, does not change the situation, nor, without more, do away with and defeat the defense of laches.

By the time petitioner filed his claim and respondent learned of the accident, all the evidence obtained by respondent had become stale; the memory of the witnesses was not the same. Examples: Petitioner's employer reported to the State Insurance Fund that the accident occurred at 10:00 A.M. (Res. Exhibit No. 2, R. 133); in a statement given one month after the accident to an investigator of the State Insurance Fund petitioner also states that the accident occurred at 10:00 A.M. (Resp. Exhibit No. 1, R. 131-132); in a deposition on August 21, 1959, petitioner expressed that the accident occurred between 11:00 and 11:30 A.M. (R. 31-32), but by the time the case was tried, petitioner claims the accident occurred at 3:00 or 3:00 P.M. (R. 24).

In the statement above referred to to an investigator of the State Insurance Fund, petitioner describes his accident: "Just as I was about to receive the draft apparently the winchman from inside drew back on the sling load and carried me making me fall to the pavement and upon falling I could not get up because I felt a severe pain in my waist and part of the inguinal region." (R. 132).

Yet at the trial petitioner does not mention that the sling carried him making him fall, but claims that he slipped and fell seated on the platform. (R. 24).

As pointed out by the Circuit Court's opinion while some witnesses testified to loose beans falling from the drafts they also testified as to rice and feed. Yet the evidence before the Court was that beans were discharged from 8:00 to 11:30; canned goods from 11:30 to 3:30 and general cargo (which includes rice and feed) from 3:30 to 4:00 in the afternoon. (Resp. Exhibit No. 9, R. 155), interpreted by testimony of Mario Ramirez (R. 105).

Although petitioner attempted to prove non-prejudice, he failed in any way to excuse the undue delay. According to his own testimony, by the middle of 1957, several months

before the statute of limitations expired, he consulted and referred the case to an attorney who left for the States. (R. 25-26). He did not bother to follow up on what his attorney was doing but he merely slumbered on his rights until the middle of 1958 when he consulted another attorney (R. 26) and still waited until January 1959 before filing his libel. The fact that petitioner consulted an attorney did not put respondent on notice. Had petitioner filed a suit promptly, he would not have placed the respondent in the inequitable situation caused by filing suit in January 1959.

From the above it it submitted that the Circuit Court's findings that petitioner failed to justify his delay in filing suit and that respondent was prejudiced by such delay are amply supported by the record.

Conclusion

The decision of the United States Court of Appeals for the First Circuit should be affirmed.

Respectfully submitted,

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